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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JACKIE COLLINS LERMAN,

Petitioner,

v.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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28 pp

Questions Presented

1. If a sexually explicit magazine publishes and uses for promotional purposes petitioner's name on its cover, and includes inside the magazine nude photographs that are falsely stated to be of her, do the First and Fourteenth Amendments forbid a state to subject the publisher and distributor to liability for a non-consensual invasion of her rights, unless the attribution has been proved to be malicious in the sense of *New York Times Co. v. Sullivan, Time, Inc. v. Hill* and *Gertz v. Robert Welch, Inc.*?

2. Do the facts that a successful female author of erotic novels who wrote the screenplay for a film involving nudity and has publicly favored sexual equality for women make her a "limited purpose public figure" who must prove "actual malice" in order to recover for invasion of her privacy by the false assertions that (a) she performed in that film in the nude and (b) still photographs of her in the nude from that film were republished in the magazine?

3. Is a distributor who receives actual notice of the unlawful use of a person's name, and is expressly warned against advertising the offensive issue of a magazine, insulated from liability by the actual malice standard as a matter of law because it does not review issues of the magazine and thus does not actually know that prohibited advertising appeared in subsequent issues?

4. Did the Court of Appeals violate the requirements of fair procedure by ordering the dismissal of the action rather than remanding for a new trial?

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FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Jackie Collins Lerman prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on September 10, 1984.

Opinions Below

The opinions of the Court of Appeals, 745 F.2d 123, and of the District Court, 544 F. Supp. 966, 521 F. Supp. 228, 496 F. Supp. 1105, appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 10, 1984. A timely petition for rehearing *in banc* was denied on October 25, 1984, and this Court on January 18, 1985 extended petitioner's time within which to petition for certiorari until February 23, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The First and Fifth Amendments to the Constitution of the United States, and §§50 and 51 of the New York Civil Rights Law are set out in their entirety in the Appendix.

Statement of the Case

A sexually explicit men's magazine, *Adelina*, contained a regular section called "Archives" which each month featured nude photographs of female celebrities. The May 1980 issue of *Adelina* announced on its cover that Jackie Collins (along with Charlotte Rampling, Karen Black, Anna Moffo and others) appeared "in the nude" in the "Archives" section of the magazine (87a). At page 119 of the May 1980 issue, Jackie Collins was described in bold print as the "starlet" depicted in a single nude photograph and in a photograph of an orgy scene of two men and three women; the photographs were stills from the movie "The World Is Full Of Married Men" (88a). Petitioner is neither an actress nor a "starlet," but is a successful novelist who wrote the screenplay for that film, but never appeared nude in that or any other film, and the photographs are not of her.

Petitioner learned of this publication upon receiving at her residence in London, England, an advance copy of the May 1980 issue of *Adelina* from her former publicist, who believed the photographs were actually of her. On March 24, 1980, petitioner commenced an action for libel, statutory invasion of privacy under §§50 and 51 of the New York Civil Rights Law, and violation of her right of publicity against the publisher of *Adelina*, Chuckleberry Publishing, Inc. ("Chuckleberry"), and the national distributor listed in the magazine, Publishers Distributing Company, Inc. ("PDC"). The lawsuit was filed in the United States District Court for the Southern District of New York, and jurisdiction was based on diversity of citizenship under 28 U.S.C. §1332(a)(2).

A preliminary injunction was entered on March 31, 1980, and on July 31, 1980, the District Court granted partial summary judgment on petitioner's privacy claim. *Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. 1105 (S.D.N.Y. 1980). Subsequently, the cover of the May 1980 issue of *Adelina*, using petitioner's name under the bold caption "in the nude," was reprinted as part of a tearout subscription advertisement for the magazine. The subscription advertisement appeared in both the June 1980 and January 1981 issues of *Adelina*, and petitioner was granted leave to serve a supplemental complaint to assert similar claims based upon these additional publications. At the same time, the District Court denied the defendants' motions for summary judgment on the libel claim, holding petitioner to be a private person rather than a public figure. *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228 (S.D.N.Y. 1981). PDC had conceded that petitioner was not a general purpose public figure, but argued that she was a limited purpose public figure. The District Court rejected that argument on the ground that:

> It is difficult to conclude that the issue of sexual liberation of actresses in American film is more than a matter of general public interest that may be newsworthy. In my opinion, it simply cannot be said that there is a real dispute with respect to this matter, the outcome of which affects the general public or some segment in an appreciable way . . .
>
> Furthermore, Lerman "at no time assumed any role of public prominence in the broad question of concern," *id.* at 135, 99 S.Ct. at 2688, if one can be said to exist, about the sexuality of actresses in American film. Lerman did not write about the sexual liberation of actresses on the screen and certainly did not inject her views into a controversy on this topic. Lerman herself never

> modeled and although she had a brief acting career, it does not appear that she ever appeared nude on the stage or the screen. Finally, although Lerman was photographed on several occasions for publicity purposes, she was never photographed in the nude.
>
> Defendant's contention that plaintiff is a public figure for the limited purpose of promoting, publicizing and selling sex must be rejected. First, as discussed above, such a general characterization of the public controversy does not isolate with the required particularity, the controversy which gave rise to the defamation in this case. Second, the consequence of adopting defendants' analysis would be to expose any prominent author of novels about human sexuality who engages in conventional promotional activities to publicize them to the risk that intimate details of his personal life may be disclosed falsely by a news media clothed with the protections of *Times v. Sullivan* and its progeny. This result would be improper where the author has not injected his personal conduct or his own nudity into the public discussion. Furthermore, such an approach would undermine the legitimate interests of the states in protecting their citizenry from "the harm inflicted . . . by defamatory falsehood" *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341, 94 S.Ct. at 3008. *Id.* at 234-35.

At the same time, the District Court granted petitioner's motion for summary judgment as to liability against PDC on the right of publicity claim, finding all of the elements of that tort established by the factors that created statutory liability for invasion of privacy.

During the course of discovery, petitioner learned that the national distributor for the June 1980 and January

1981 issues of *Adelina* had not been PDC, but was Flynt Distributing Company, Inc. ("Flynt"), which had purchased the assets and assumed the liabilities of PDC pursuant to a written agreement dated February 29, 1980. On April 15, 1981, petitioner sued Flynt for identical causes of action arising from Flynt's distribution of the June 1980 and January 1981 issues of *Adelina*.

After Flynt answered interrogatories, petitioner learned for the first time that Flynt was legally responsible for the May 1980 issue of *Adelina* as well, since it expressly assumed all of PDC's liabilities for *Adelina* as of February 29, 1980, almost a month before the on-sale date of the May 1980 issue. Accordingly, petitioner moved to amend her complaint against Flynt to include the May 1980 issue, and to consolidate the lawsuit against Flynt with the pre-existing lawsuit against Chuckleberry and PDC. On June 3, 1982, both motions were granted. Petitioner was also granted partial summary judgment as to liability against Flynt on her privacy and publicity claims, and Flynt's motion for summary judgment on the ground that the advertisements using her name were protected as isolated and incidental uses was denied. *Lerman v. Chuckleberry Publishing, Inc.*, 544 F. Supp. 966 (S.D.N.Y. 1982).

The action against Chuckleberry was stayed because of bankruptcy proceedings, and petitioner settled with PDC in February 1983. In June 1983, the District Court dismissed petitioner's libel claim as defective on the ground that the false statements about her appearing nude constituted at most libel *per quod* and that petitioner had not pleaded or sought any special damages. The District Court further held that any violation of her right of publicity was subsumed within her statutory right of privacy. The case proceeded to trial on June 13, 1983.

The District Court charged the jury in order to hold Flynt liable for the May 1980 issue "plaintiff must prove by a preponderance of the evidence that Flynt Distributing

was the distributor of the May 1980 issue of *Adelina.*" The District Court also charged that petitioner had the burden of proving her case for damages "by a fair preponderance of the evidence." The court advised the jury, however, that it had found Flynt liable for distribution of the June 1980 and January 1981 issues of *Adelina,* and that its responsibility was to assess compensatory damages for those claims. In addition, the District Court charged as follows:

> In order for plaintiff to recover punitive damages against FDC for violation of section 51 of the New York Civil Rights Law, plaintiff is required to prove that FDC knowingly used plaintiff's name without her consent in distributing the June 1980 and January 1981 issues of Adelina. If you find that FDC in distributing the June 1980 and January 1981 issues, acted in reckless disregard of whether plaintiff had consented to the use of her name, you may also award punitive damages. The burden of proving knowing or reckless use is on the plaintiff. By reckless disregard is meant not just negligent use, but use in conscious disregard of whether consent had been granted. Absent a showing of such knowing or reckless use, plaintiff is not entitled to recover punitive damages.

On June 17, 1983, using a special verdict form, the jury returned a $40,000,000 verdict in petitioner's favor, awarding her $7,000,000 in compensatory and $33,000,000 in exemplary damages, consisting of $800,000 compensatory damages arising from the May 1980 issue, $1,200,000 compensatory and $1,000,000 punitive damages arising from the June 1980 issue, and $5,000,000 compensatory and $32,000,000 punitive damages arising from the June 1981 issue of *Adelina.* The District Court granted a remittitur, reducing the exemplary damages award by $30,000,000, leaving intact $7,000,000 compensatory and

$3,000,000 exemplary damages. It was from this $10,000,000 judgment that Flynt appealed.

On September 10, 1984, the Court of Appeals reversed the judgment and dismissed petitioner's complaint. *Lerman v. Flynt Distributing Co.*, 745 F.2d 128 (2d Cir. 1984). It disagreed with the District Court that the use of plaintiff's name and purported nude picture without her consent sufficed to create liability under the New York privacy statute as a use "for purposes of trade," and that knowing use without consent sufficed, as the statute provides, for exemplary damages. Granting that "plaintiff's name in all three *Adelina* issues are [sic] fictionalized or false and therefore lose the privilege that ordinarily extends to reporting matters in which the public has an interest" and, further, that "the degree of falsity here was severe since plaintiff was not the actress pictured," the Court acknowledged that "[w]ere it not for Constitutional concerns this falsity would permit a properly instructed jury to find the uses here to be for trade purposes under §51 of the New York Civil Rights Law," *i.e.*, that the judicially constructed privilege for a newsworthy use would not arise. 745 F.2d at 133. It proceeded to hold, however, that "precisely because of First Amendment guarantees, Flynt Distributing cannot be held liable for the use of plaintiff's name unless it acted with the requisite fault . . . ". *Id.* The "requisite fault," in the Court's view, was that required by this Court's decision in *Gertz v. Robert Welch, Inc.*, to impose liability for defamation of a "limited purpose public figure" (which plaintiff was held to be for purpose of this publication), namely, "clear and convincing evidence that some high level employee" of Flynt "acted with reckless disregard of the fact that false matter had been published . . . " *Id.* at 140.

Since the District Court had not instructed the jury that it must find Flynt to have acted with "actual malice" in the foregoing sense, the judgment was reversed. Moreover,

assessing the evidence adduced by the petitioner, the Court of Appeals considered that a "properly instructed jury could not fairly and rationally conclude upon clear and convincing evidence that this defendant's uses were knowing or made with actual malice," *id.* at 141, "evidence of 'knowing use'" being regarded as "identical to the evidence of actual malice," *id.* at 140. Concluding that "Ms. Lerman cannot present clear and convincing evidence of defendant's requisite fault with respect to the factual error disseminated," *id.* at 142, the Court of Appeals not only reversed the judgment but also dismissed the complaint. Judge Bonsal, sitting by designation, dissented from the judgment of dismissal, expressing the view that the case should be remanded to the trial court to accord plaintiff "an opportunity for further discovery and a trial on the issue of actual malice—whether defendant acted with knowledge of falsity or in reckless disregard of the truth." *Id.*

Reasons for Granting the Writ

I.

In holding that the First and Fourteenth Amendments forbid a state from imposing civil liability for use of petitioner's name and purported nude pictures without her consent in the absence of "actual malice" with respect to the erroneous attribution, the Court of Appeals ignored the teaching of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). At the least, the Court of Appeals has decided an important issue of constitutional law which has not been, but should be, settled by this Court.

Once the Court of Appeals categorized plaintiff's lawsuit as a "classic false light claim," 745 F.2d at 134, it felt constrained to apply the constitutional limitation of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), a false light case which did not involve a claim of commercial appropriation. In this case, the petitioner was complaining about the wrongful *use* of her name as much as the falsity of the portrayal; merely because the use involved an element of falsity does not justify the application of a greater constitutional

degree of fault than would otherwise be appropriate for a commercial appropriation case. The Court of Appeals should have followed the teaching of *Zacchini*, decided ten years after *Hill*, which on its facts and underlying policy is far more analogous to this case.

In holding that petitioner must prove that Flynt acted with "the requisite fault," the Court of Appeals blindly applied the "actual malice" test, rather than ascertaining whether a lower standard, such as a "knowing use," would be sufficient to satisfy the constitutional requirement of fault. In the circumstances of this case, the statutory requirement of "knowing use" afforded Flynt ample constitutional protection, and petitioner should not have been subjected to the more stringent requirement of proving "actual malice."

Just as this Court has made clear that "[m]isleading advertising may be prohibited entirely," *Re R.M.J.*, 455 U.S. 191, 203 (1982), so too may "knowing use" of a person's name for purposes of trade be made the subject of liability.* Even Mr. Justice Powell, who dissented in *Zacchini* on the ground that there was First Amendment protection for the television broadcast, would have denied that protection if that form of commercial appropriation had been "a subterfuge or cover for private or commercial exploitation" rather than news. 433 U.S. at 581.

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* In *R.M.J.*, this Court recognized that "truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *Id.* This Court cited in footnote 15, *Central Hudson Gas & Electric Corp. v. Public Service Corporation*, 447 U.S. at 566, for the proposition that for commercial speech to come within the First Amendment "it at least must concern lawful activity and not be misleading."

The use of petitioner's name on the cover of a pornographic magazine for the sole purpose of drawing attention to the magazine and attracting purchasers is a commercial rather than a newsworthy purpose, and cannot be excused by the "subterfuge" of the vapid text that appears within the magazine accompanying nude photographs purporting to be of the petitioner. The evidence clearly established commercial appropriation, and it was error to apply the elevated constitutional protection of the "actual malice" standard merely because the commercial appropriation included an element of falsity.

The question raised by this case is whether the protection framed in *Time, Inc. v. Hill,* is required as a matter of constitutional law, or whether this is a matter which should be left to the states for regulation on the basis of some lesser degree of fault defined by state law—such as "knowing use" under §51 of New York's privacy statute. As this Court recognized in *Zacchini,* there are multiple state interests which underlie the various aspects of the privacy tort. 433 U.S. at 573. Earlier Mr. Justice White writing for the majority in *Cox Broadcasting Co. v. Cohn,* 420 U.S. 467 (1975), noted that in reviewing the leeway of the states to protect privacy interests "it is appropriate to focus on the narrower interface between press and privacy," *id.* at 481, and Mr. Justice Powell in his concurring opinion stated that "the Constitution may present a different balance to be struck" depending upon the interests intended to be protected, *id.* at 500.

In *Time, Inc. v. Hill,* this Court was only addressing one of these interests. As explained in *Zacchini,* 433 U.S. at 571-72:

> *Time, Inc. v. Hill,* which was hotly contested and decided by a divided Court, involved an entirely different tort from the "right of publicity" recognized by the Ohio Supreme Court. As the opinion reveals in *Time, Inc. v. Hill,* the Court

> was steeped in the literature of privacy law and was aware of developing distinctions and nuances in this branch of law. The Court, for example, cited W. Prosser, Law of Torts 831-832 (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif. L. Rev. 383 (1960), both of which divided privacy into four distinct branches. The Court was aware that it was adjudicating a "false light" privacy case involving a matter of public interest, not a case involving "intrusion," 385 U.S. at 384-385, n.9, 17 L.Ed.2d 456, 87 S.Ct. 534, "appropriation" of a name or likeness for the purposes of trade, *id.*, at 381 17 L.Ed. 456, 87 S.Ct. 534, or "private details" about a non-newsworthy person or event, *id.*, at 383 n.7, 17 L.Ed.2d 456, 87 S.Ct. 534.

Moreover, this Court in *Time, Inc. v. Hill* stressed that its holding was limited to its peculiar facts, which involved fictionalization of the ordeal of a family held hostage for nineteen hours by a group of escaped convicts. In that case, a core of facts was embellished and fictionalized upon to present the family in a false light. In this case, the publication of petitioner's name was not predicated upon a core of truthfulness, but upon a total falsification for sensational purposes. Thus, the use of petitioner's name on the cover of *Adelina,* with those of several other celebrities, was for the commercial and exploitative purpose of attracting purchasers. There was no embellishment or fictionalization of true events or occurrences which are within the sphere of legitimate public interest and concern. Instead, the unauthorized exploitation of petitioner's name represents the kind of commercial appropriation actionable under available state remedies.

There is a considerable difference between the false statement in *Time, Inc. v. Hill* that the play was a reenactment of a family's ordeal and the false claim in this

case that petitioner appears nude in *Adelina*. In the former situation, there is a genuine First Amendment need for the press to have the breathing space necessary to fully review and describe a play that was inspired by a real life experience; in the latter situation, the use of petitioner's name was not in the context of reviewing a play, reporting news or disseminating information, but rather solely for the shock value of allegedly exposing nude photographs of a celebrity. The constitutional protections deserved by these uses are different and should not be treated in the same way; the accommodation between the First Amendment and individual privacy interests should be reached in this case by allowing the states to define the standard of liability, as this Court permitted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), so long as it is not liability without fault. *Id.* at 397.

The commercial exploitation here is far closer to *Zacchini* than to *Hill*. In *Zacchini*, the Ohio Supreme Court ruled, as did the Court of Appeals in this case, that the privilege of *Hill* extended to cover a new branch of the privacy tort—newscasts that impinge upon an individual's right to publicity. This Court reversed that holding, deciding that although a state may grant the press such a privilege, the First Amendment does not require it to do so.

Several important factors were noted by this Court in *Zacchini*. First, the television station *knew* that the plaintiff objected to its use of his act. Second, *Rosenbloom*, *Gertz* and *Firestone*, the relevant libel precedents decided subsequent to *Hill*, all involved the reporting of news events. Third, it was aware of the variety and diversity of conduct encompassed by the privacy tort. The Court quoted with approval from Prosser and from a Third Circuit Court decision, *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956), which commented that the rights of privacy and publicity were two "polar types of cases" and [b]etween

the two extremes are many gradations, most involving strictly commercial appropriation of some aspect of an individual's personality, such as his name or picture." 433 U.S. at 572 n.9.

In *Zacchini*, this Court did not view *Time v. Hill* applying across the board to the entire field of privacy, and specifically indicated that the commercial appropriation present there was not to be accorded constitutional protection. This case cries out for definition and guidance from this Court so that lower courts do not continue to apply the doctrine of *Time, Inc. v. Hill* in such an expansive manner as to undermine the individual's right to be free from commercial exploitation.

II.

Assuming that liability for invasion of privacy is subject to the constitutional standard defined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requiring public figure analysis, the decision of the Court of Appeals that petitioner is a "limited purpose public figure" for purposes of any publication relating to nudity clearly conflicts with the recent decisions of this Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979).

The Court of Appeals assumed, properly in our view, that the "actual malice" requirement articulated in *Time, Inc. v. Hill* has been modified *sub silentio* by this Court in its decision in *Gertz*, which rejected the public interest test of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).* However, although the Court of Appeals professed to apply the

* As Mr. Justice Powell expressly recognized in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 498 n.2 (1975); "*Gertz* calls into question the conceptual basis of *Time, Inc. v. Hill*"; Restatement of Torts, Second §652E, comment d. See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 250-51 (1974).

public figure test of *Gertz* for determining whether petitioner was a "limited purpose public figure," it actually reverted to the "public interest" test *Hill* had adopted for privacy cases and *Gertz* had later discredited.

The cases decided since *Gertz* make it clear that a person should not be considered a "public figure" solely because that person attracts public attention, for example, as a criminal defendant, *Wolston v. Reader's Digest Ass'n, supra*, a socialite seeking a divorce, *Time, Inc. v. Firestone, supra*, or a recipient of a government grant, *Hutchinson v. Proxmire, supra*. The lesson of these cases is that the mere involvement of a person in a matter which the media or the public deems to be of interest does not, in and of itself, require that such person be classified as a public figure for even the limited purpose of a libel action, and courts must look for evidence of affirmative acts by which that person has thrust himself into the forefront of a particular public controversy.

In finding petitioner to be a limited purpose public figure in the controversy that purportedly "swirl[s] about . . . contemporary standards regarding nudity," the Court of Appeals defined a public controversy as "any topic upon which sizeable segments of society have different, strongly held views." 745 F.2d at 138. This definition of "controversy" departs from the particularized controversy requirement of this Court's most recent libel decisions, and misapplies the public figure definition to reinstate the discarded "public interest" test of *Rosenbloom*.

Moreover, the concern expressed by the Court of Appeals about the "deep-freeze" effect on the media of privacy suits like petitioner's would better be addressed to authors who, under the rationale of the Court of Appeals, can now become falsely portrayed by a privileged press as any fictional character about whom they write. The creative process itself will be chilled if authors can be falsely identified with the characters they invent and be deemed

public figures when they seek redress for invasion of their privacy.

The petitioner here did not voluntarily inject herself into the vortex of a *particular* controversy raging over whether starlets should appear nude. To say she forfeited her personal right of privacy because of her general feminist opinions on the subject is tantamount to abolishing the right of privacy for anyone who is capable of expressing opinions. That she has voluntarily chosen to deal with the subject publicly at press conferences and in her novels, does not mean she abandoned her right not to be portrayed in the nude without her consent.

In *Wolston v. Reader's Digest Ass'n, supra,* 443 U.S. at 167, this Court explained that: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention . . . " In *Time, Inc. v. Firestone, supra,* 424 U.S. at 453-54, this Court warned against equating "public controversy" with "all controversies of interest to the public" and held that a *particular* public controversy was not created by the "cause celebre" of Mrs. Firestone's divorce.

Similarly, in *Hutchinson v. Proxmire, supra,*443 U.S. at 134-35, this Court held that "concern about general public expenditures" did not identify a "particular controversy." If it did, "everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected." *Id.* at 135. The subject of "contemporary standards regarding nudity," 745 F.2d at 138, is no more particular a controversy than "concern about general public expenditures." To hold otherwise employs general "subject-matter classification" which "too often result in an improper balance between the competing interests in this area." *Time, Inc. v. Firestone, supra,* 424 U.S. at 456.

The Court of Appeals essentially deemed petitioner a limited purpose public figure because her erotic novels have attracted public attention and she has made promotional appearances in connection with her literary works. On this basis alone she was required to prove liability by clear and convincing evidence of "actual malice." These limited activities should have classified her as a private figure, giving her the opportunity to prove Flynt's liability on the basis of a less stringent standard and a different quantum of proof.

III.

Even if the "actual malice" standard applied as a matter of constitutional law, the Court of Appeals was wrong in holding on this record there was insufficient evidence to present that issue to the jury, and in any event erred in dismissing the case rather than remanding it for a new trial.

In view of the advance notice and warning given to Flynt of the unauthorized use of petitioner's name, the ruling that no malice exists as a matter of law effectively eliminates the "reckless disregard" branch of the "actual malice" test and makes it impossible for a plaintiff ever to satisfy that stringent burden of proof.

This Court has defined "actual malice" alternatively as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Thus it is not necessary to show an actual subjective awareness of falsity, so long as there exist serious doubts as to the truth.

By holding that the evidence in this case fails to create even a triable issue of "actual malice," the Court of Appeals focused solely upon "subjective awareness" of falsity, totally ignoring the reckless disregard branch of that test. Moreover, its analysis places a premium upon

ignorance and allows a culpable party to avoid liability "by the simple expedient of closing one's eyes, covering one's ears and holding one's breath." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 500, 410 N.Y.S.2d 282, 286 (1978).

It is well recognized that to discharge the difficult burden of proving "actual malice," circumstantial evidence must be relied upon. *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979). In this case, the approach of the Court of Appeals foreclosed the possibility of inference from circumstantial proof, and elevated the burden to a virtually unattainable level.

The Court of Appeals in effect held that "the trial judge should have granted summary judgment to the defendant based on the lack of evidence of actual malice." 745 F.2d at 140. This result destroys the impact of the clear proof of notice and express warning to Flynt, which evidence is especially significant since "proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire, supra*, 443 U.S. at 120 n.9.

In a brief passage from its lengthy opinion, the Court of Appeals purported to undertake a "careful examination of the voluminous record," 745 F.2d at 140, but totally ignored the key proof that created an issue of fact. Reciting that Flynt's knowledge of petitioner's lawsuit and its failure to investigate, standing alone, are insufficient to constitute "actual malice," the Court of Appeals inexplicably failed even to mention the letter dated April 11, 1980 to Flynt from PDC, the former distributor of *Adelina* (89a), whose assets had been purchased by Flynt prior to distribution of the offending magazines.

Besides explaining to Flynt in detail the basis for petitioner's lawsuit and her successful application for a preliminary injunction, the letter demanded that Flynt "should properly shoulder the responsibility with regard

to said Magazine and the above action" (89a), and specifically warned Flynt that it was enjoined from advertising the May 1980 issue of *Adelina*— yet that is precisely what Flynt proceeded to do when it distributed the June 1980 and January 1981 issues. Flynt thus had actual notice of petitioner's contentions concerning the unauthorized use of her name, the commencement of her lawsuit, the granting of a preliminary injunction directing the recall of the magazines and the entry of partial summary judgment in petitioner's favor determining that her statutory right to privacy had been violated. This proof certainly created a jury issue as to Flynt's reckless disregard for these warnings which, coupled with absolutely no information supporting the truth of the publication, shows actual malice on the part of Flynt.*

This Court has already rejected the proposition that "[p]rofessions of good faith" standing alone are sufficient to overcome a claim of malice, and has recognized that a duty of further inquiry may arise under some circumstances. *St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968). Thus, a defendant cannot "feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982), and cases cited therein; *Hunt v. Liberty Lobby*, 720 F.2d 631, 644 (11th Cir. 1983).**

* New York's highest court has approved punitive damage awards on the basis of prior notice or warning. *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 146, 151 (1982); *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978).

** Although the Court of Appeals paid lip service to the "reckless disregard" prong of the "actual malice" test, it nevertheless insisted that reckless disregard had to relate to the "fact that false matter had been published," 745 F.2d at 140, rather than to the repeated, unauthorized use of petitioner's name,

(footnote continued on the following page)

Moreover, the Court of Appeals' outright dismissal of petitioner's complaint, rather than remanding for a new trial, contravenes accepted notions of fairness as well as procedural due process and the right to a jury trial guaranteed by the Fifth and Seventh Amendments. This Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), restated "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The Court of Appeals' misreading of *Bose Corp. v. Consumers Union*, 52 U.S.L.W. 4513 (1984), led it to exceed its proper authority as an appellate tribunal. In *Bose*, this Court held that an appellate court may make an independent examination of the entire record to ensure that a finding of "actual malice" is based on clear and convincing evidence. *Bose* announced a standard of appellate *review;* it did not authorize an appellate court to make an *original* finding of fact on an issue not addressed below. Implicitly acknowledging the absence of any finding of "actual malice" in this case, the Court of Appeals enabled itself to apply the *Bose* doctrine only by erroneously equating "actual malice" with "knowing use" under §51 of the New York Civil Rights Law.

"Actual malice" concerns a defendant's knowledge of some alleged falsity; "knowing use" concerns a defendant's

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(footnote continued from the preceding page)
which was the gravamen of her complaint. As indicated in Point I above, since commercial appropriation primarily addresses a wrongful taking of property rights, the Court of Appeals' labelling of petitioner's claim as a "false light" case caused it to unduly emphasize the falsity aspect of her complaint rather than the misuse of her name. To then conclude that no jury could "rationally" find "actual malice" on this record, *id.* at 141, was to misapply the reckless disregard branch of the "actual malice" test in this case of commercial appropriation.

knowledge of an unauthorized use of a person's name or likeness to which falsity may be irrelevant. New York law recognizes the difference between the two standards. *Welch v. Mr. Christmas, Inc.*, 57 N.Y.2d 143 (1982). Proof of one has little or nothing to do with proof of the other. Based on the District Court's summary judgment decisions declaring the "actual malice" test inapplicable to this case, petitioner sought at trial to prove "knowing use" and understandably did not pursue discovery and proof of "actual malice." It is this record of "knowing use" that the Court of Appeals mistakenly reviewed for clear and convincing evidence of "actual malice," and found the evidence lacking because of its erroneous premise that "actual malice" is the same as "knowing use."

The proper procedure should have been to remand for a new trial, as was done in *Time, Inc. v. Hill, supra*, 385 U.S. at 394 n.1. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), this Court found that, while a jury verdict required reversal due to the trial court's failure to apply the "actual malice" standard, the case would be remanded for retrial, and *not* dismissed. In this case, having found that the District Court erred in failing to apply the "actual malice" test, the Court of Appeals should not have foreclosed petitioner from presenting her case under appropriate jury instructions. As Judge Bonsal said in partial dissent, the fact that petitioner may have a heavy burden to show "actual malice" is not a "sufficent reason to deny her the opportunity to do so." 745 F.2d at 142.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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ALEXANDER L. STEVAS,
CLERK

84-1359

No.

IN THE

Supreme Court of the United States

October Term, 1984

JACKIE COLLINS LERMAN,

Petitioner,

against

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

Appendix to Petition For a Writ of Certiorari

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Opinion of the United States Court of Appeals For the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 724--August Term, 1983

(Argued January 30, 1984

Decided September 10, 1984)

Docket No. 83-7735

JACKIE COLLINS LERMAN,

Plaintiff-Appellee,

—against—

FLYNT DISTRIBUTING CO., INC.,

Defendant-Appellant.

Before:

VAN GRAAFEILAND and CARDAMONE, *Circuit Judges,* and BONSAL, *District Judge.**

* Honorable Dudley B. Bonsal, United States District Court Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Werker, J.) following a jury trial in which plaintiff was awarded $10,000,000 for violations of N.Y. Civ. Rights Law §§ 50-51 and plaintiff's right to publicity.

Reversed. Judge Bonsal concurs and dissents in a separate opinion.

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IRVING SCHER, New York, New York (Lauren W. Field, Tami J. Aisenson, Weil, Gotshal & Manges, New York, New York of counsel) *for International Periodical Distributors Association, Inc., American Booksellers Association, Inc., National Association of College Stores, and Periodical and Book Association of America, Inc., Amici Curiae.*

CARDAMONE, *Circuit Judge*:

Freedom of expression preserves all other liberties so inseparably that freedom of the press and a free society either prosper together or perish together. Yet, because of its enormous power, the contemporary press is under heavy attack because of a widely held perception that it uses its special First Amendment status as a license to invade individual privacy. This case illustrates the complexity of the concerns when these interests clash.

Defendant, a national distributor of magazines in which offensive material concerning plaintiff appeared, appeals from a judgment in plaintiff's favor. In her action plaintiff asserted causes of action for libel, violation of a statutory right of privacy, and appropriation of the common law right to publicity. In every invasion of privacy suit there is a course to be run in order for plaintiff to reach the goal of recovery. In this case, plaintiff's libel action was dismissed and her right to publicity claim fails to fit within that tort. The civil rights cause does not lie as one for advertising purposes, as that term is defined under state law; but it does state a cause of action for defendant's invasion for trade purposes of her right to privacy. Having successfully progressed that far, plaintiff would need to demonstrate a level of defendant's fault on that privacy claim sufficient to satisfy constitutional protection for freedom of the press. Here, on the final lap, plaintiff's proof falls short.

I *Background*

On February 29, 1980 the plaintiff Jackie Collins Lerman received a package at her home in London, England. An accompanying letter from a publicity agent who had

formerly worked with Ms. Lerman explained that nude photographs, supposedly of plaintiff, appeared in the enclosed advance copy of *Adelina* magazine. Plaintiff discovered that the May 1980 issue of *Adelina* had misidentified her as an actress who appeared in Ms. Lerman's and her husband Oscar Lerman's movie entitled "The World is Full of Married Men." Two black and white photographs of the anonymous actress printed from the movie film appeared on pages 120-21 of the magazine. The misidentified actress appears topless in one of the pictures and in an "orgy" scene in the other. The caption identifies the photos as being Ms. Lerman and labels her as the "starlet" who appeared in an orgy scene in the film.

The cover of the magazine proclaimed to its readers: "In the Nude from the *Playmen* archives . . . Jackie Collins." The short article accompanying the actress' photo with Ms. Lerman's name comments on the increasing willingness of "serious" actresses to appear nude in films. While Ms. Lerman authored the book and wrote the screenplay for "Married Men" and her husband directed the movie, she did not appear in the movie, clothed or otherwise, and has never appeared nude in public.

Immediately upon receipt of this package, Ms. Lerman retained a lawyer and three weeks later—on March 24, 1980—commenced an action in the United States District Court for the Southern District of New York (Werker, J.) against the publisher, Chuckleberry Publishing, Inc. ("Chuckleberry"), and against the original national distributor, Publishers Distributing Company, Inc. ("PDC" or "Publishers Distributing") based upon the May 1980 publication and distribution of *Adelina*. Plaintiff sought an injunction and damages based on (a) libel (b) defen-

dant's violation of New York's Civil Rights Law §§ 50-51 and (c) invasion of her common law right to publicity.

On March 31 the district judge issued a preliminary injunction restraining the distribution of *Adelina*. While the extent of the original defendants' compliance with that injunction is disputed, it is clear that Publishers Distributing informed all of its more than 500 nationwide wholesale customers of Ms. Lerman's lawsuit and the outstanding injunction, and requested that all unsold copies of the magazine be returned. Chuckleberry nevertheless included in its June 1980 *Adelina* issue a subscription solicitation page that reprinted, in reduced size and among other reprinted *Adelina* covers, the May 1980 cover page that claimed to contain a photo of Jackie Collins "In the Nude from the Playmen archives." The identical solicitation page appeared six months later in the January 1981 issue of *Adelina*.

On March 17, 1980, shortly before the original lawsuit was commenced, but after the May issue of *Adelina* was already in the channels of distribution, Flynt Distributing Company (Flynt Distributing or FDC), the present appellant, purchased the contract to distribute *Adelina* from Publishers Distributing. Flynt Distributing was joined as a party defendant to this litigation in April 1981. Plaintiff sought the same relief against Flynt Distributing with respect to the June 1980 and January 1981 distribution of *Adelina* as she had sought against the original defendants for the May publication. In an amended complaint plaintiff asserted these same causes of action against Flynt Distributing for the May 1980 issue.

The district court granted plaintiff's motions for summary judgment against Chuckleberry Publishing, Publishers Distributing and Flynt Distributing for violations of New York's Civil Rights Law §§ 50-51 and for

defendant's invasion of plaintiff's right to publicity. Plaintiff's libel action against the defendants was dismissed. In February 1983 plaintiff settled with Publishers Distributing for $100,000. Chuckleberry is in Chapter 11 bankruptcy reorganization.

In June 1983, with both original defendants out of the case, plaintiff proceeded to trial before a jury against Flynt Distributing. Ms. Lerman sought damages under her New York statutory privacy claim and her common law right to publicity arising from the May 1980 publication. Inasmuch as liability had already been determined in her favor by the trial court's grant of summary judgment, she also sought damages for distribution of the June 1980 and January 1981 editions of *Adelina*. After a short trial the jury returned a special verdict determining that defendant Flynt Distributing was liable for the May 1980 issue and awarding Ms. Lerman a total of $7 million in compensatory and $33 million in exemplary damages.[1] The trial court struck $30 million from the exemplary damage award, leaving intact an award of $7 million compensatory and $3 million exemplary damages. It is from this $10 million judgment that defendant Flynt Distributing has appealed.

Since plaintiff has not cross-appealed, we need not consider whether the district court correctly dismissed plaintiff's libel claim on the ground that she failed to

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1 The jury returned the following verdicts:

	Compensatory	*Exemplary*
May 1980	$800 thousand	None
June 1980	1.2 million	$ 1.0 million
Jan. 1981	5.0 million	32.0 million
TOTAL VERDICTS	$7.0 million	$33.0 million

plead special damages. Discussion will focus primarily on two causes of action—New York's statutory action for violation of the right of privacy and the common law action for violation of the right to publicity. The parties agree that New York law governs in this diversity case.

II *Grounds for Recovery Under State Law*

A. *Background Leading to Enactment of New York's Right of Privacy Statute*

The traditional common law rein on media abuse was the libel action. But in 1890 Samuel Warren and Louis Brandeis announced their recognition of a developing right of privacy. *See generally* S. Warren and L. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890). The article was a direct response to perceived abuses by the mass media of the day:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. . . . [M]odern enterprise and invention have, through invasions upon [man's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 196.

Following the Warren-Brandeis article, courts were asked to recognize this "new" tort. The New York Court of Appeals rejected the invitation in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902), where the picture of an attractive young woman, used without her permission, adorned more than 25,000 posters advertising the defendant's flour. Her suit for this invasion of her privacy was dismissed by New York's highest court. In

1903 the public outcry over this seemingly unfair decision resulted in the enactment by the New York State Legislature of sections 50 and 51 of the Civil Rights Law, entitled "Right of Privacy." Section 50 provides criminal penalties for the use of a person's name, picture or likeness for advertising or trade purposes (the only two cases ever brought under § 50 were dismissed before trial), and § 51 gives the individual victim of such use the right to obtain an injunction and a cause of action to obtain compensatory and exemplary damages:

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without [his] written consent . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner . . . the jury in its discretion may award exemplary damages.

New York Civ. Rights Law § 51 (McKinney Supp. 1983). New York's highest court has consistently reminded litigants that "there exists no so-called common law right to privacy" in New York. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 497 n.2 (1978); *see Arrington v. The New York Times Co.*, 55 N.Y.2d 433, 440 (1982).

B. *New York's Right of Privacy Statute*

In granting summary judgment to plaintiff against the original defendants, Publishers Distributing and Chuckle-

berry, under sections 50-51,[2] the district court stated: "To make out a claim under section 51, a plaintiff must establish (1) that the defendant used plaintiff's name, portrait or picture within the state, (2) for purposes of advertising or trade, and (3) without first obtaining plaintiff's written consent." 496 F. Supp. 1105, 1107-08. The trial court continued, "The fact that Publishers [PDC] may not have known that the plaintiff's name was being used without her consent and in the manner in which it was used is irrelevant to the questions of compensatory damages and injunctive relief." *Id.* at 1109. The court did not then decide the public figure question, concluding that actual malice was not required even if plaintiff were a public figure where the use was not informational but rather, "completely exploitive, [and] commercial." Id. at 1110. The district court held "there is no such informational or newsworthy dimension to Chuckleberry's unauthorized use of plaintiff's name," and that "the use of her name was for a commercially exploitive effect rather than for the purpose of informing the public about a newsworthy event." *Id.* at 1107-08. As we shall discuss shortly, these statements were in some respects inaccurate and in other respects erroneous as a matter of law. The district court was equally in error in its June 3, 1982 opinion when it granted summary judgment to plaintiff against Flynt Distributing. 544 F. Supp. 966.

On its face the New York privacy statute seems to provide a cause of action only for "commercial appropriation," defined in *Roberson* as the defendant's act, "for his own selfish purpose to use the picture or the name of another for advertising purposes without his

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[2] Because the provisions of § 50 are incorporated in § 51, reference will be made only to § 51.

consent." *Roberson, supra*, 171 N.Y. at 545. Commentators and the American Law Institute recognize "commercial appropriation" as only one of four kinds of invasion of privacy and distinguish it from the torts of publicly placing a person in a false light, intrusion upon one's personal solitude and the public disclosure of private facts. *See, e.g.*, W. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960); Restatement (Second) of Torts § 652A (1976). The last two invasions—intrusion upon personal solitude and public disclosure of private facts—are not the subject of any claim on this appeal. The first two torts—commercial appropriation and false light—are implicated.

Analysis must commence with the New York statute and the substantial case law it has spawned. *See*, L. Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 Albany L. Rev. 1 (1983). The terms "advertising purposes" and "trade purposes" constitute the two prongs of the statute and their meaning, as construed by New York courts, is crucial to an analysis of plaintiff's claims in this case.

1. *Advertising Purposes Under § 51*

Where the use of plaintiff's name is solely for the purpose of soliciting purchasers for defendant's products the advertising purposes prong of the statute is violated. *See, e.g., Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 284 (1959) (defendant safe company reprinted in an advertising circular a newsphoto of a burning building and the accompanying news story, which mentions plaintiff's name several times and relates how the fire started when plaintiff returned some merchandise); *Selsman v. Universal Photo Books, Inc.*, 18 A.D.2d 151, 152 (1st Dep't

1963) (camera manual where use of plaintiff's name and picture held to be for advertising purposes because it went beyond educational purpose and expounded the virtues of the camera). To be a use for advertising purposes, "the use must appear in or as part of an advertisement or solicitation for patronage." *Ginsberg v. News Group Publications*, 9 Med. L. Rep. 2014, 2016 (Sup. Ct. Nassau Cty. 1983); *see also Eliah v. Ucatan Corp.*, 433 F. Supp. 309, 312 (W.D.N.Y. 1977) (use of picture to advertise suntan products); *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971) (photo of Pola Negri used to advertise antihistamene tablets); *Reilly v. Rapperswill Corp.*, 50 A.D.2d 342 (1st Dep't 1975) (plaintiff's film used to advertise insulation). The New York Court of Appeals has held that to be liable for compensatory damages for use of a person's name, portrait or picture based on an advertising purpose claim, defendant need not have known that its use was without plaintiff's consent. *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 149 (1982); *accord*, *Cohen v. Herbal Concepts, Inc.*, N.Y.L.J., March 12, 1984, at 7, col. 1 (1st Dep't).

When the advertisement is merely incidental to a privileged use there is no violation of § 51. *See Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 810 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (biographical sketch of child prodigy originally published in magazine and later used to advertise the sketch in a newspaper unobjectionable). Plaintiff cannot argue that the use of her name (accompanied by a photo of an unclad woman) in the May 1980 issue of *Adelina* was for advertising purposes. She did not show a "use for the solicitation of patronage for a particular service or product." *Pagan v. New York Herald Tribune*, 32 A.D.2d 341, 343 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 941 (1970). The June 1980 and January 1981 uses

could be viewed as for advertising purposes since they solicited orders for back issues of *Adelina*. But, the republications in the June 1980 and January 1981 subscription solicitations were incidental to the May 1980 publication. Because the solicitations were designed simply to convey the nature and content of past *Adelina* issues, they cannot form the basis for an independent claim under the advertising use prong of § 51. *See Sidis v. F-R Publishing Corp.*, *supra*, 113 F.2d at 810; *Namath v. Sports Illustrated*, 48 A.D.2d 487, 488 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 897 (1976); *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 350 (1st Dep't) (per curiam), *aff'd*, 11 N.Y.2d 907 (1962). *Accord*, *Lawrence v. A.S. Abell Co.*, 475 A.2d 448 (Md. 1984).

2. *Trade Purposes Under § 51*

Next, we examine whether the uses of plaintiff's name were for "purposes of trade" under the statute. Because the media in reporting the news routinely uses names and likenesses without consent, New York courts early recognized the need to encourage the free exchange of ideas and created a broad privilege for the legitimate dissemination to the public of news and information. *See, e.g.*, *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467 (1st Dep't 1919); *Colyer v. Fox Publ. Co.*, 162 App. Div. 297, 299-300 (2d Dep't 1914). The trade purposes prong of the statute may not be used to prevent comment on matters in which the public has a right to be informed. In *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (1952), the Court of Appeals dismissed an animal trainer's objection to a televised broadcast of his act performed at half-time of a Washington Redskins' professional football game. Where plaintiff is a public personage or an actual partici-

pant in a newsworthy event, the use of his name or likeness is not for purposes of trade within the meaning of § 51. *Id.* at 359-61. Yet, there are limits to the privilege: "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." *Id.* at 359. Since "newsworthiness" and "public interest" are to be "freely defined," *Arrington v. The N.Y. Times Co.*, *supra*, 55 N.Y.2d at 440, the use of plaintiff's name in connection with the movie "The World is Full of Married Men" is a matter in which the public plainly has a legitimate interest.

Plaintiff may still be entitled to obtain the sanctions of § 51 under the trade purposes prong even where the use is in conjunction with a report on a matter of public interest, but in order to do so must meet one of two tests. First, a plaintiff may attempt to demonstrate that the use of plaintiff's name or likeness has no real relationship to the discussion, and thus is an advertisement in disguise. *See*, *Mayers v. Michals*, 9 Med. L. Rep. 1484 (N.Y. Cty. Sup. Ct. 1983) (use of photo in connection with article on rape victims); *Martin v. Johnson Publ. Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956) (photographs of unknowing women used to illustrate article); *Metzger v. Dell Publ. Co.*, 207 Misc. 182, 186 (N.Y. Cty. Sup. Ct. 1955) (use of bystanders' photo in article describing gangs in detective magazine); *cf. Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 409-10 (1971) (plaintiff who attended a St. Patrick's Day Parade in green hat and bow tie has no trade purposes claim against use of his picture in defendant's magazine in a story entitled "The Last of the Irish Immigrants"); *Delan v. CBS, Inc.*, 91 A.D. 2d 255, 259

(2d Dep't 1983) (mental patient has no trade purposes claim when shown in news documentary on mental hospitals); *Lahiri v. Daily Mirror*, 162 Misc. 776, 782-83 (N.Y. Cty. Sup. Ct. 1937) (professional photo of plaintiff used in story exposing "Indian Rope Trick" is use for general public interest, not for trade purposes). Alternatively, a plaintiff may claim that defendant forfeited the privilege for reporting matters on which the public has the right to be informed by proving that the defendant's use was infected with material and substantial fiction or falsity, *see Goldberg v. Ideal Publishing Corp.*, 210 N.Y.S.2d 928, 929 (Sup. Ct. N.Y. Cty. 1960) (lurid account of rabbi's life in romance magazine). Even when so infected, for defendant to lose the newsworthy privilege plaintiff must prove that defendant acted with some degree of fault regarding the fictionalization or falsification. *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

We cannot accept plaintiff's first argument that the photo in this case has "no real relationship" to any discussion in *Adelina*. Ms. Lerman wrote the book and screenplay that contained scenes of nudity for the film "The World is Full of Married Men." While the article in *Adelina* was vapid it did relate to the growing use of nudity in films. Insofar as the use of the name "Jackie Collins" is concerned the May 1980 use must be considered incidental to the story, and hence not objectionable as a "disguised advertisement" under § 51. *See University of Notre Dame Du Lac v. Twentieth Century Fox*, 22 A.D.2d 452 (1st Dep't), *aff'd*, 15 N.Y.2d 940 (1965). Further, plaintiff's status as an author and screenwriter of a film in the erotic genre makes her claim of "no connection" with these particular photographs unpersuasive. Certainly she has as much or more connection with this

article than did the plaintiffs in *Murray, Delan* and *Lahiri, supra*. Thus, Ms. Lerman was not an innocent bystander without any relationship to the subject matter of the article and to the photograph.

Plaintiff's reliance on the alternative basis for defeating the newsworthy privilege rests on firmer ground, that is, the fictionalization or falsification ground. *See, e.g., Sutton v. Hearst Corp.*, 277 App. Div. 155 (1950) (while woman was bequeathed one perfect rose a week by secret admirer, complaint stated cause of action because story so embellished as to be fictionalized). *See also Spahn v. Julian Messner, Inc., supra, Binns v. Vitagraph Co*, 210 N.Y. 51, 56 (1913) (war hero fictionalized). The *Spahn* court stated that the degree of falsity must be severe, and found it in that case because the former great National League pitcher's life had been significantly misrepresented by defendant. 21 N.Y.2d at 127.

The recent case of *Davis v. High Society Magazine, Inc.*, 90 A.D.2d 374 (2d Dep't 1982), *appeal dismissed*, 58 N.Y.2d 1115 (1983) is strikingly similar to this one. Plaintiff, a female boxer, discovered that the defendant publisher had misidentified her as a boxer pictured topless in defendant's magazine. The trial court granted plaintiff's summary judgment motion under § 51 without regard to the defendant's knowledge of the factual error. The Appellate Division found plaintiff to be a public figure and reversed the lower court's ruling. The court stated that "a public official or public figure seeking to recover against a media defendant under the Civil Rights Law because of some falsification must prove that the defendant was aware of the falsification or recklessly disregarded the truth." 90 A.D.2d at 382. We believe *Davis* sets forth the correct analysis for this type of misidentification. Ms. Lerman attempts to distinguish

Davis because there the plaintiff was a boxer, while Ms. Lerman has never been a "starlet." But the critical element in *Davis* as in this case is the misidentification, *i.e.*, the factual error. When presented with a factual error which brings an otherwise privileged newsworthy use within the trade purpose prohibition, the Supreme Court and the New York Court of Appeals have required that there be a finding of fault. *See generally Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Spahn v. Julian Messner, supra*.

We agree that plaintiff's name in all three *Adelina* issues are fictionalized or false and therefore lose the privilege that ordinarily extends to reporting matters in which the public has an interest. Further, the degree of falsity here was severe since plaintiff was not the actress pictured. Were it not for constitutional concerns this falsity would permit a properly instructed jury to find the uses here to be for trade purposes under § 51 of the New York Civil Rights law. But, precisely because of First Amendment guarantees Flynt Distributing cannot be held liable for the use of plaintiff's name unless it acted with the requisite fault, and it is on this last point that plaintiff's proof fails as we will later explain.

3. *Distributor's Liability Under § 51*

When dismissing plaintiff's libel claim in its August 1981 opinion, the district court ruled that "the New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation." 521 F. Supp. at 235. Thus, it granted summary judgment to Publishers Distributing on that issue as to the May 1980 article, but found "that questions of fact clearly are

presented with respect to whether special circumstances existed requiring PDC to review the content of the issues of *Adelina* published after the May 1980 issue." Without discussion, the district judge then refused to apply this same limitation on distributor liability for § 51 purposes.

Flynt Distributing argues that plaintiff failed to prove that it "used" her name or picture under § 51. This argument is quite like a defendant's argument at common law that he did not "publish" a libel. *See, e.g.*, W. Prosser, Law of Torts § 113, at 775 (4th ed. 1971). *See Industrial Equipment Co. v. Emerson Electric Co.*, 554 F.2d 276, 289 (6th Cir. 1977); *Skeoch v. Ottley*, 377 F.2d 804, 808 (3d Cir. 1967); Restatement (Second) of Torts §§ 577, 588 and comment d. While a similar requirement may exist in the law of privacy, J. Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093, 1109 (1962), there is little contemporary case law in New York defining the contours of the "use" required for compensatory damages under § 51. But the New York Court of Appeals has ruled in a commercial appropriation case that defendant's lack of knowledge that plaintiff had not consented was no defense to a compensatory damage claim under § 51. *Welch v. Mr. Christmas*, *supra*, 57 N.Y.2d 143; *accord*, *Thompson v. Close-up, Inc.*, 277 App. Div. 848 (1st Dep't 1950) (per curiam) (use by allegedly innocent mistake).

We need not hazard to guess how New York Courts would apply these authorities to Ms. Lerman's claim. Rather, we assume that *Welch v. Mr. Christmas* correctly states the rule and that, as a matter of New York law, plaintiff met the "use" requirement merely by showing that Flynt Distributing purchased the contract entitling it to profits from the May 1980 issue and by participating in the distribution of the June and January issues of *Adelina*.

C. *Plaintiff's Claim of a Right to Publicity*

In her complaint, plaintiff also included a cause of action based upon her common law right to publicity on which the district court granted her summary judgment. It is unnecessary to determine the precise outlines of that right under New York law because it is not implicated. Here, the right to publicity is essentially identical to the right to be free from commercial appropriation. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-72 (1979); *see Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213 (N.D. Ill. 1981). In light of the proof, a claim for commercial appropriation or violation of the right to publicity does not lie. "[M]uch confusion shrouds the so-called 'right to publicity.' " *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). In *Factors*, we expressly equated this "separate tort" with Dean Prosser's privacy tort of appropriation of name or likeness. *Id.* at 220-22. *Accord, Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983). It is a right of relatively recent origin having been first applied by us in *Haelan Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). The right is one designed to encourage intellectual and creative works and to prevent unjust enrichment.

In a publicity case the plaintiff is not so concerned that the use occurs; he simply wants to be the one to decide when and where, and to be paid for it. The essence of the right is the plaintiff's substantial property interest in his "entire act," *Zacchini, supra*, 433 U.S. at 574, his likeness, *Grant v. Esquire*, 367 F. Supp. 876, 880 (S.D.N.Y.

1973), or even his "style," *Groucho Marx v. Day and Night Co.*, 689 F.2d 317 (2d Cir. 1982). The action is based upon defendant's attempt "to broadcast or publish that for which the performer normally gets paid." P. Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 Tulane L. Rev. 836, 868 n.120 (1983) (citing *Grant v. Esquire, supra*).

Because the plaintiff must generally have developed a property interest with financial value in order to prove that he suffered damages, the right is most frequently invoked by public figures or celebrities. *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D. N.J. 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978). Thus, Ms. Lerman's insistence that she is a private person insofar as *these Adelina* articles are concerned does not square with her claim that her right to publicity was appropriated. Plaintiff did not establish a prima facie cause of action for violation of her right to publicity. She has never exploited the value of her nude appearance and obviously cannot claim to have developed a property interest in the subject matter of this alleged infringement. Moreover, proof that this is not a right to publicity case is in plaintiff's demand for relief—she sought to enjoin publication and to salve her wounded feelings—neither of which are the kinds of injuries that the publicity tort is designed to remedy. There is simply no evidence that any defendant deliberately exploited plaintiff's fame and fortune. Inasmuch as the facts fail to establish a violation of plaintiff's right to publicity as a matter of law, her cause of action on that theory should have been dismissed.

D. *False Light Tort Distinguishable from Right to Publicity*

Despite this conclusion, we undertake a brief analysis of the false light tort because it is essential to an understanding of the application of the First Amendment to § 51. While not specifically alleged in her complaint, Ms. Lerman's action presents a classic false light claim, which is distinguishable from her right to publicity cause of action. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Supreme Court observed that New York Courts have construed the language of § 51 broadly enough to encompass false light claims. *Id.* at 381, 384-85. In *Time, Inc. v. Hill*, *Life* magazine had printed a story stating that the play, *The Desparate Hours*, was a reenactment of the Hill family's highly publicized ordeal with a group of escaped convicts. While based on the incident, the play had fictionalized the event. New York courts granted recovery to Hill under § 51 based on *Life's* false statement that the play was a factual reenactment of the ordeal. The Supreme Court reversed holding that claims under New York's statute based on a fictitious or falsified report which would otherwise be privileged are not actionable, absent proof of knowledge of falsity or reckless disregard of the truth. The Court stressed that where falsity is the gravamen of a § 51 claim, First Amendment guarantees permit imposition of liability only where actual malice is shown. *Id.* at 387-88. As the Supreme Court said in *Time, Inc. v. Hill*, and later implied in *Zacchini v. Scripps-Howard Broadcasting*, *supra*, 433 U.S. at 573, it is essential to analyze "trade purposes" claims under § 51 to determine whether First Amendment concerns surrounding this false light tort are implicated. If not, the press is entitled only to the limited First Amendment protection afforded under *Zacchini*.

In examining the false light tort, we turn to section 652E of the Restatement (2d) of Torts that provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Assuming the requisite proof of fault, the facts of this case state a cause of action under section 652E. The nude actress pictured was not Ms. Lerman. Whether or not this misidentification is defamatory to Ms. Lerman, *cf. McGraw v. Watkins*, 49 A.D.2d 958, 959 (3d Dep't 1975) (film with nude scene of plaintiff "does not necessarily impute unchastity to plaintiff"), we cannot conclude that such publicity is not "highly offensive to a reasonable person." *See Arrington v. The New York Times*, *supra*, 55 N.Y.2d 433, 442 (taking and publishing plaintiff's picture without his knowledge or consent in connection with an article on the "Black Middle Class" was not "highly offensive to persons of ordinary sensibilities" under the Restatement § 652E formulation). Hence, if a false light claim under the Restatement rubric is recognized in New York, Ms. Lerman has stated a claim under it.[1]

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[1] The district court addressed the June 1980 and January 1981 subscription solicitations and found in its June 3, 1982 decision they "would appear to fit squarely within the exception for advertising incidental to the news medium except that plaintiff was not properly and fairly presented in the May 1980 issue of 'Adelina.'" 544 F. Supp.

In a false light case, however styled under a state statute or common law, the gravamen of the tort is falsity; not, as here, simply a factual error. Further, regardless of whether Ms. Lerman's cause of action is cast in terms of libel or false light or under the falsified trade purposes prong of § 51, the same constitutional protections apply. *See Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) (rejecting Rosenberg children's claims that book about their parents had both defamed them and portrayed them in a false light), *cert. denied*, 434 U.S. 1013 (1978). *Accord, Braun v. Flynt*, 726 F.2d 245, 250 (5th Cir. 1984); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Berry v. National Broadcasting Co.*, 480 F.2d 428, 431 (8th Cir. 1973), *cert. dismissed*, 418 U.S. 911 (1974); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981). Therefore, we must address the federal constitutional question to determine the appropriate standard of fault plaintiff should have been required to meet and to evaluate plaintiff's proof under that constitutional standard. In what follows we explain why plaintiff's proof falls short, defeating her cause against defendant.

III *Constitutional Issues*

A. *Public or Private Figure*

To begin, the district court erroneously ruled in 1980 that the public figure question had application only to plaintiff's dismissed libel claim. Moreover, when Flynt Distributing attempted to reopen this question on the remaining causes of action prior to trial, the district court refused to reconsider its earlier ruling. In our view the

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971. Thus, the trial court implicitly recognized that the gravamen of plaintiff's complaint for those publications was grounded in false light, not commercial appropriation or right to publicity.

trial judge wrongly determined that Ms. Lerman was not a public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and its progeny.

To decide whether Ms. Lerman is a public figure, we first consider the applicable rules. Discussion begins as it must with *New York Times Co., v. Sullivan*, 376 U.S. 254 (1964). There, the Court held that a state cannot award damages to a "public official" for a defamatory falsehood concerning his official conduct, absent proof that the statement was published with "actual malice." *Id.* at 279-80. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the same standard of proof for recovery under state libel laws was extended to plaintiffs who are "public figures." *Id.* at 162-63 (Warren, C.J., concurring). When a private individual seeks compensation for publication of a defamatory falsehood, the states may define for themselves the appropriate standard of fault, subject to the constitutional minimum of negligence. *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 347.

In rejecting the argument that Elmer Gertz, a reputable lawyer, was a public figure, the Court held that only those individuals who *voluntarily inject* themselves into a particular public controversy are considered limited purpose public figures, *Id.* at 351-52. Emphasizing that the *New York Times* standard does not hinge on whether the statement concerns a matter of public interest, the Supreme Court held that a *cause celebre* divorce in Florida involving a prominent and wealthy couple was not a "public controversy." *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1975). Moreover, the fact that Mrs. Firestone sought to obtain marital redress through a court proceeding is not the kind of voluntary act or assumption of prominence in the resolution of public questions as to render her a "public figure." *Id.* at 454-55. Four years later, the Court ruled that a person was not a public figure

merely because he refused to appear before a grand jury, fully realizing that his refusal might attract publicity, because he was believed to have information of interest to the government relating to Soviet espionage. *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979). Rather than thrusting himself to the forefront of the public controversy surrounding the extent of Soviet espionage in the United States, the petitioner in *Wolston* was dragged unwillingly into the controversy. *Id.* at 166. Again, becoming the recipient of Senator Proxmire's Golden Fleece Award as a result of the receipt of federal funds for research projects did not make plaintiff a limited public figure. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Although, like the petitioner in *Gertz*, Hutchinson was a writer for professional journals, he did not thrust himself or his views into the public eye to influence others, nor did he invite public attention or have regular and continuing access to the media. *Id.* at 135-36. The question in each case is what is "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 352; *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. at 167.

These holdings provide a frame to determine what constitutes a "limited purpose public figure." A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media. Having ascertained what the basic test is, we apply it.

The record before us reveals that Ms. Lerman has achieved international renown as the author of nine

novels. Her books are decidedly controversial in nature because of her firm conviction—made the focal point of her comments to the press—that there is a pervasive inequality in the treatment accorded females vis-a-vis males. This topic greatly appeals to the public since her books sell in the millions, are full of descriptions of sex, including deviate sex and orgies, and are heavily laden with four-letter words. Ms. Lerman is quick to point out that some of her novels have been banned in Australia—a distinction similar to being banned in Boston. She has achieved a world-wide following, frequently appears as a guest on national TV and readily grants interviews to the mass media. On such occasions, one example of sexual inequality that Ms. Lerman uses refers to the fact that women more frequently than men appear unclad in films and magazines. This is unfair she claims because men have more opportunity to view undressed women than vice versa. She advocates "equal nudes for all."

Ms. Lerman's photograph is prominently displayed on the jackets of her novels that enjoy good reviews despite—or perhaps, because of—their description as "shocking," "racy," "sexy" and the like. She admits her books are considered "pornographic." Her first novel was translated into 32 languages. Movies have been made of several and, as earlier noted, the picture of the nude actress that is the subject of this litigation came from the film based on her novel "The World is Full of Married Men." Quite plainly Ms. Lerman is today in the forefront of women writing about sex and what is perceived of as a continuing double-standard in sexual mores. Thus, for plaintiff, seeking publicity both for herself and her books is part and parcel of her professional endeavors as a writer. The record plainly reflects her undoubted success in this effort. Her organized and ongoing effort to maintain media access, in order to call attention to her writings and disseminate her views on current sexual standards,

helps to sell her novels and screenplays like the one "commented upon" in the May 1980 *Adelina*.

No doubt defendant has shown that plaintiff successfully invited public attention to her views and has maintained continuing access to the media. Nonetheless, we agree with the district court that Ms. Lerman is not that rare person the *Gertz* decision identifies as an all purpose public figure. As the Court there noted, "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 351-52.

But, we believe Ms. Lerman is a limited purpose public figure required to satisfy the *New York Times* standard of fault. By voluntarily devoting herself to the public's interest in sexual mores, through extensive writing on this topic, reaping profits and wide notoriety for herself in the process, Ms. Lerman must be deemed to have purposefully surrendered part of what would otherwise have been her protectable privacy rights, at least those related in some way to her involvement in writing her books and screenplays. *See James v. Gannett Co.*, 40 N.Y.2d 415, 423 (1976) ("The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention").

The difficult question is whether Ms. Lerman injected herself into a "public controversy" related to the offending publication. The district court rejected defendants' argument that Ms. Lerman was a public figure for the limited purpose of commenting on sex and nudity in films. The court reasoned that such a topic is merely a matter of interest, but not a true public controversy. We disagree. The relations between the sexes and public

nudity are topics of continued and general public interest and may be considered "public controversies" even though not involving political debate or criticism of public officials. A public "controversy" is any topic upon which sizeable segments of society have different, strongly held views. Certainly various groups today have vastly divergent views on the propriety of female or male nudity in films and in the print media generally. In the public controversies that daily swirl about—be they politics, pocketbook issues, or, as here, contemporary standards regarding nudity—some plunge into the arena and enter the fray. Plaintiff, as a controversial, outspoken authoress and screenwriter advocating equal nudity, was such a willing participant in this public controversy. Other similarly situated individuals have been held to be limited purpose public figures, *Rose v. Koch*, 278 Minn. 235, 154 N.W. 2d 409, 426 (1967) (a well-known author); *Maule v. NYM Corp.*, 76 A.D.2d 58, 62 (1st Dep't 1980) (writer for *Sports Illustrated*), *rev'd on other grounds*, 54 N.Y.2d 880 (1981); *Atkins v. Friedman*, 49 A.D.2d 852 (1st Dep't 1975) (physician who wrote books on dieting). We conclude therefore that plaintiff must be held to be a limited purpose public figure. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 592 (1st Cir. 1980); *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1346 (S.D.N.Y. 1977).

B. *Newsworthiness for First Amendment Purposes*

The district court adopted plaintiff's argument that an actual malice standard of fault does not apply even if plaintiff is a public figure because the use was "completely exploitive" and outside the broad category of matters of public interest and therefore not newsworthy. This led it erroneously to conclude that the distributor

could be held strictly liable for disseminating the magazine without treading on the First Amendment. On the contrary, *Adelina* falls far short of crossing the line that would cause it to forfeit First Amendment protection. It contains no obscenity, *Roth v. United States*, 354 U.S. 476 (1957), child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), or matters inciting to riot, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The factual error in this case would be actionable only if the distribution of *Adelina* loses First Amendment protection under a standard analogous to that which causes libelous speech to lose such protection. *See Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). We cannot accept a view that a publication must meet an independent standard of newsworthiness to stand under the umbrella of First Amendment protection. Even "vulgar" publications are entitled to such guarantees. *Winters v. New York*, 333 U.S. 507, 518 (1948). It makes no difference that *Adelina* may have few redeeming features, that it may express a point of view far afield from what one might consider the community's standard of decency, or that an ordinary reader may find it distasteful. The compass of the First Amendment covers a vast spectrum of tastes, views, ideas and expressions. *Pring v. Penthouse International, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 312 (1983). *Accord, Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958); *Goelet v. Confidential, Inc.*, 5 A.D.2d 226, 229 (1st Dep't 1958) (magazine capitalizing on intimate details of lives of prominent individuals). To hold otherwise would draw a tight noose around the throat of public discussion choking off media First Amendment rights.

The *Adelina* article unquestionably would have been within the broad definition of a newsworthy matter or a

335-36 ("subjective awareness of probable falsity"). The essential inquiry is whether those in charge of Flynt Distributing had serious doubts about the accuracy of the identification of Ms. Lerman in *Adelina*. *See Pep v. Newsweek*, 553 F. Supp. 1000 (S.D.N.Y. 1983); *Pirre v. Printing Developments, Inc.*, 468 F. Supp. 1028, 1038-39 (S.D.N.Y. 1979). *See also Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026 (5th Cir. 1975) (actual malice "is not a proposition that can be supported by a normative conclusion that the publisher should have known of the falsity of the statement"). Inasmuch as the district court failed to instruct the jury that it must find Flynt Distributing to have acted with actual malice, the jury's verdicts must be reversed. Nevertheless, since the record is complete with regard to Flynt Distributing's knowledge and conduct, both of which are necessary to prove a "knowing use" for punitive damages under § 51, we examine the evidence to etermine whether a new trial is warranted.

2. *Actual Malice in This Case*

Although the trial court granted the plaintiff's motion for summary judgment and did not instruct the jury on actual malice, it did put Ms. Lerman on notice of the need for her to prove a "knowing use" under the statute itself. Thus, plaintiff and her experienced counsel had every incentive to uncover facts during discovery and to present evidence at trial showing Flynt Distributing's knowledge or reckless disregard of the publisher's false report concerning Ms. Lerman. Such evidence of "knowing use" is identical to the evidence of actual malice. Accordingly, we "make an independent examination of the whole record 'in order to make sure that a [verdict finding actual malice] would not constitute a forbidden

Whether a distributor is held liable for false and defamatory matter or for false matter invading privacy, the imposition of liability without adequate proof of fault would unquestionably chill the exercise of distributors' First Amendment rights. *See Time, Inc. v. Hill, supra*, 385 U.S. at 388-89; *Geiger v. Dell Publ. Co.*, 719 F.2d 515, 518 (1st Cir. 1983); *Bargar v. Playboy Enterprise, Inc.*, 564 F. Supp. 1151, 1157 (N.D. Cal. 1983).

Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment. At the same time a distributor as an integral part of the movement of information from the creator to the reader—the distributor here was to receive 46% of the profit from the sale of the magazine—cannot be entirely immune from liability. When a distributor acts with the requisite scienter in distributing materials defaming or invading the privacy of a private figure it must be subject to liability. *Lewis v. Time, Inc.*, 83 F.R.D. 455, 464 (E.D.Cal. 1979). *See Suarez v. Underwood*, 103 Misc.2d 445, 447 (Queens Cty. Sup. Ct. 1980), *aff'd*, 84 App. Div.2d 787 (2d Dep't 1981). But, a public figure plaintiff may only recover compensatory damages where a distributor acts with "actual malice," and no plaintiff—public figure or private individual—may recover punitive damages unless the *New York Times v. Sullivan* standard is met.

To have acted with constitutional or actual malice, the defendant must be shown to have had "a high degree of awareness of [the statement's] probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or to have "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at

matter of public interest or concern had Ms. Lerman in fact been the "starlet" pictured. *Ann Margret v. High Society*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980); *Davis v. High Society, supra*, 90 A.D. 2d at 383. That there was a factual error does not alter the subject matter of the offending publication. As noted earlier, New York law must yield in this context to First Amendment concerns which protect the media from liability for such errors, absent proof of fault. Courts are, and should be, reluctant to attempt to define newsworthiness. *Gaeta v. New York News Inc.*, ____ N.Y.2d ____ (1984). The Supreme Court in *Gertz* expressly warned against "committing this task to the conscience of judges." *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 346. *Cf. Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 5086-87 (U.S. 1984) (nor should the task be undertaken by legislators since a statute that attempts to prohibit reproductions of United States obligations unless made for newsworthy purposes is held violative of the First Amendment). Rather, the factual error is only actionable against defendant distributor if made with the *Gertz* required fault. What then is the appropriate standard of fault in cases involving distributors?

C. *Proof of Actual Malice*

1. *Actual Malice of Distributors*

First Amendment guarantees have long been recognized as protecting distributors of publications. *Smith v. California*, 361 U.S. 147, 150 (1959); *Winters v. New York, supra*, 333 U.S. at 509; *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1937); *Ex Parte Jackson*, 96 U.S. 727, 733 (1877) ("Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.")

intrusion on the field of free expression.' " *Bose Corporation v. Consumers Union of United States*, 52 U.S.L.W. 4513, 4517 (1984) (quoting *New York Times v. Sullivan*, *supra*). *See Time v. Pape*, 401 U.S. 279, 284 (1971); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Buckley v. Littell*, 539 F.2d 882, 888 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). While that constitutional duty does not permit us to substitute our views for legitimate jury findings, *see Time, Inc. v. Hill*, *supra*, 385 U.S. at 394 n.11, it does require us to scrutinize the record closely. The question to decide is whether the trial judge should have granted summary judgment to the defendant based on the lack of evidence of actual malice.

In the first place, plaintiff failed to offer proof sufficient even to impose a duty on defendant Flynt Distributing to inquire as to the May 1980 issue and the district court specifically found that there was no "knowing" use under § 51 by defendant of plaintiff's name in that issue. Further, there was no proof that any of defendant's employees had reason to believe that Chuckleberry (the publisher) would misidentify Ms. Lerman as the actress pictured. Because we have determined that plaintiff is a limited purpose public figure required to prove actual malice for compensatory damages, the claim arising from the May 1980 issue must be dismissed.

Similarly, with respect to the June 1980 and January 1981 issues there is no evidence in the record showing that Flynt Distributing knew or recklessly disregarded whether these editions contained any mention of plaintiff, let alone any factual error concerning her. As noted, "actual malice" as is implied in that expression is a subjective test focused on defendant's state of mind. *See Herbert v.*

Lando, 441 U.S. 153, 160 (1979). Flynt Distributing may be held liable only if plaintiff presented clear and convincing evidence that some high level employee of the corporation acted with reckless disregard of the fact that false matter had been published by Chuckleberry. The only evidence pointing in that direction is the conceded fact that Flynt Distributing knew of plaintiff's lawsuit against Chuckleberry and Publishers Distributing for the May 1980 issue, plus a claimed failure thereafter by it to investigate. Plaintiff cites no other evidence in her brief, and careful examination of the voluminous record in this case reveals none.

Absent are any facts demonstrating that anyone in the defendant distributing company had a subjective awareness of probable falsity. Notice of the lawsuit regarding the May issue standing alone certainly is not clear and convincing evidence as to knowledge for June and January, especially given the miniscule mention of plaintiff in those issues. Moreover, mere failure to investigate, while relevant, is also not itself sufficient to show actual malice. *See Hotchner v. Castillo-Puche*, *supra*, 551 F.2d at 913; *Washington Post Co. v. Keough*, 365 F.2d 965, 971 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). Failure to investigate is an especially weak criterion in the case of a distributor of hundreds of publications. While distributors may know something of the contents of publications that they contract to distribute, there is ordinarily little reason for them to examine the scores of magazines distributed. In sum, there is simply no evidence—which plaintiff had every incentive to develop to obtain punitive damages—that any Flynt Distributing employee was aware that the publisher's errors would reoccur. Consequently, we hold as a matter of law that a properly instructed jury could not fairly and rationally conclude

upon clear and convincing evidence that this defendant's uses were knowing or made with actual malice.

IV *The Damage Awards*

The jury awarded plaintiff a total of seven million dollars in compensatory damages, which the trial court refused to reduce. No doubt such an enormous verdict chills media First Amendment rights. But a verdict of this size does more than chill an individual defendant's rights, it deep-freezes that particular media defendant permanently. Putting aside First Amendment implications of "megaverdicts" frequently imposed by juries in media cases, the compensatory damages awarded shock the conscience of this Court. They are grossly excessive and obviously a product of plaintiff's counsel's appeals to the passion and prejudice of the jury. It cannot seriously be contended that Ms. Lerman's lacerated feelings are worth anything close to $7 million. No proof was offered that she sought or needed professional help because of these publications and the fact she completed a novel between March and September in 1980 refutes her contention that she was unable to work. In any event, damages under the New York statute often are only nominal since they are designed primarily to compensate for injury to feelings. *See Lombardo v. Doyle, Dane and Bernbach, Inc.*, 58 A.D.2d 620, 621 (2d Dep't 1977). Applying California law on facts somewhat analagous to those in the instant case, $25,000 was found to be "substantial compensation for mental anguish." *Clark v. Celeb. Publ. Inc.*, 530 F. Supp. 979, 983 (S.D.N.Y. 1981). *See also Pirre v. Printing Development, Inc.*, 468 F. Supp. 1028, 1038 (S.D.N.Y. 1979) (extremely sensitive plaintiff entitled to no more than $45,000 for mental anguish); *Myers v. U.S. Camera*

Publ. Corp., 9 Misc. 2d 765, 768 (1957) ($1500 total damages for publishing unauthorized full body nude photograph of plaintiff).

Finally, we note that reputational damage to Ms. Lerman could not have been great. Only the readers of *Adelina*, a magazine of relatively modest circulation that Ms. Lerman describes as "sordid" and "obscene" would have seen the offending material. In fact, given the number of famous persons portrayed in this fashion, one wonders whether such pictures are even capable of producing genuine reputational harm. Even assuming the word would get around to those whose esteem of plaintiff would be diminished, the main source of publicity for the pictures came not from the magazine's publication, but from Ms. Lerman's lawsuit and statements to the press.

The jury also awarded a total of $33 million in punitive damages, more than plaintiff demanded in her complaint and over six times greater than plaintiff's counsel requested in his summation. This award also shocks our conscience and reinforces our conclusion that the verdicts represent appeals to passion or prejudice.

V *CONCLUSION*

The availability of damages depends on plaintiff's ability to satisfy the actual malice standard of *New York Times v. Sullivan* that plaintiff as a limited purpose public figure was required to meet. Since Ms. Lerman cannot present clear and convincing evidence of defendant's requisite fault with respect to the factual error disseminated, the judgment awarding her ten million dollars in compensatory and punitive damages is reversed as a matter of law and her complaint against Flynt Distributing is dismissed.

BONSAL, *District Judge, concurring and dissenting.*

I concur in much of the majority's excellent opinion. I agree that the plaintiff must be considered a limited purpose public figure who has voluntarily injected herself into an on-going controversy through her writings and media appearances. I also agree with the majority that the case of *Davis v. High Society Magazine, Inc.*, 90 A.D.2d 374 (2d Dept. 1982) is "strikingly similar to this one." In *Davis*, as here, the trial court granted summary judgment for the plaintiff without considering whether the defendant had acted with actual malice. The Appellate Division held that, as a limited purpose public figure, the plaintiff had to establish that the defendant had acted with actual malice in order to recover under New York Civil Rights Law § 51. Finding insufficient evidence in the record to establish that the defendant had acted with actual malice, it reversed the trial court's grant of summary judgment, stating:

> [T]here is an element of plaintiff's cause of action which is in dispute and which cannot be resolved on this motion. It is incumbent upon plaintiff to prove at trial that defendants published the subject issue of *Celebrity Skin* with actual malice . . . . *Davis*, at 383.

The court in *Davis* noted that "[t]he existence or absence of actual malice 'does not lend itself to summary disposition' since it pertains to 'a defendant's state of mind.' " *Davis*, at 384 (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979)).

While I agree with the majority that the plaintiff here has a heavy burden to establish actual malice, I do not think that is sufficient reason to deny her the opportunity

to do so. Therefore, I would remand the case to the trial court to give her an opportunity for further discovery and a trial on the issue of actual malice—whether defendant acted with knowledge of falsity or in reckless disregard of the truth.

Opinion of the United States District Court Southern District of New York, dated July 31, 1980.

UNITED STATED DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

JACKIE COLLINS LERMAN,

Plaintiff,

against

CHUCKLEBERRY PUBLISHING INC., and PUBLISHERS DISTRIBUTING CORPORATION,

Defendants.

80 Civ. 1658 (HFW)

728 Dated: 7/31/80

Appearances: (See last page).

HENRY F. WERKER, D.J.

This action for libel, invasion of privacy and violation of the right of publicity was commenced by plaintiff Jackie Collins Lerman against defendants Chuckleberry Publishing Inc. (''Chuckleberry'') and Publishers

Distributing Corporation ("Publishers".[1] This case is presently before the court on plaintiff's motion for partial summary judgment on her claim of invasion of privacy under sections 50 and 51 of the New York Civil Rights Law (McKinney 1976 & Supp. 1979-1980). Plaintiff also moves for an expedited trial on the issue of damages. Chuckleberry cross-moves to compel discovery.

FACTS

Chuckleberry and Publishers are, respectively, the publisher and national distributor of a magazine entitled *Adelina*. The cover of the May 1980 issue of *Adelina* bears the headline "In the Nude From the Playmen Archives," and lists, among others, the plaintiff's name. At pages 117-20 of the issue, there is a section headed "Archives" which contains erotic and nude photographs of purportedly well-known actresses. At page 119, plaintiff's name appears in bold lettering accompanying photographs of a naked woman and an orgy scene with two men and three women. Underneath the "Jackie Collins" caption is the statement that "Jackie is a newcomer to films and her fist was the *The World Is Full Of Married Men,* from the novel by the late Jacqueline Susann. There is an orgy scene . . . [a]nd after that, what can a starlet do for an encore?" It is clear that plaintiff does not in fact appear in any of

[1]Plaintiff is a citizen of the United Kingdom residing in London, England. Chuckleberry and Publishers are New York corporations. Jurisdiction is premised on diversity of citizenship with an amount in controversy exceeding $10,000. 28 U.S.C. § 1332. Although defendants claim that a question of fact exists as to plaintiff's citizenship, they have not adduced any evidence that would dispute plaintiff's claim that she is a British citizen.

the photographs,[2] and it is undisputed that plaintiff is not an actress but rather a successful novelist and screenwriter. She wrote the screenplay for the film *The World Is Full Of Married Men* which was based on a novel written by her and not by the late Jacqueline Susann.

Plaintiff asserts that she never granted defendants consent, written or otherwise, to use her name. The defendants do not deny that they never obtained a written release from plaintiff, Chuckleberry, however, states that the material which is the subject of this lawsuit was previously published in Italy by its Italian licensor, Tattilo Editrice SPA, in the August 1979 issue of *Playmen*. Chuckleberry's Italian licensor purportedly obtained the photographs and text in precisely the form in which they appear in *Adelina* from the Luxembourg office of Media Press International ("MPI"), a public relations firm. The material allegedly was received and distributed by MPI in connection with the promotion of the film *The World Is Full Of Married Men*. Chuckleberry states that it assumed that MPI had releases for the use of this material. According to Chuckleberry, MPI insists that all necessary releases were obtained with respect to the distribution of the pictures in question. However, MPI apparently refuses to furnish Chuckleberry with any such release by plaintiff. Affid. of Walter Zacharius, President of Chuckleberry, sworn to May 12, 1980, at 3-4.

This action was commenced by the filing of a complaint on March 24, 1980. An order to show cause was issued the

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[2]Although defendants in their Rule 9(g) statement claim that a question of fact exists as to whether or not the magazine in question contains photographs of plaintiff, since they have not adduced any material to seriously dispute plaintiff's sworn statement that she is not in any of the photographs in the magazine, defendants have not demonstrated that such a question of fact does indeed exist. Fed. R. Civ. P. 56(e); *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1979).

same day, and following a hearing on March 31, 1980, a preliminary injunction was granted by this court. Thereafter, plaintiff filed and served an amended complaint. The instant motions followed.

DISCUSSION

In moving for summary judgment on her invasion of privacy claim, plaintiff argues that the defendants used her name in the May 1980 issue of *Adelina* for purposes of trade without her consent. In opposing the motion, the defendants rely principally on two arguments: (1) because the plaintiff is a public figure and because her name was used in connection with a "newsworthy" event, they cannot be liable for publishing her name unless the plaintiff establishes malice, *citing inter alia Time, Inc. v. Hill,* 385 U.S. 374 (1967), and (2) the plaintiff purportedly delivered a release in connection with similar or identical material published in an Italian magazine. In connection with the latter argument, defendants contend that plaintiff has refused to cooperate with discovery requests, and that they therefore have not been able to ascertain certain facts, including whether or not a prior release had been granted to MPI.

Section 51 of the Civil Rights Law provides in pertinent part:

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained [of such person] may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . . .

N.Y. Civil Rights Law § 51 (McKinney Supp. 1979-1980).

To make out a claim under section 51, a plaintiff must establish (1) that the defendant used plaintiff's name, portrait or picture within the state, (2) for purposes of advertising or trade, and (3) without first obtaining plaintiff's written consent.

It is clear that the defendants did use plaintiff's name within the state. The May 1980 issue of *Adelina* bore plaintiff's name on the cover and her name was used again on page 119 of that issue. The issue was published and distributed throughout the United States, including New York. Hence, the first element of a section 51 cause of action has been established.

Defendants' use of plaintiff's name on the cover of *Adelina* and associated in the "Archives" section with photographs of a nude woman and an orgy scene purporting to include plaintiff is unquestionably a commercial use for the purpose of trade within the meaning of the statute. In *Wallace v. Weiss,* 82 Misc. 2d 1053, 372 N.Y.S.2d 416 (Sup. Ct. Mon. Co. 1975), the court observed that:

> Where a photograph is not used in connection with an advertisement and does not illustrate an article on a matter of public interest, but appears in a periodical primarily to enhance the sales of the periodical, the use may be considered a commercial one for the purpose of trade. Thus, it cannot be doubted that the subject of a centerfold has a cause of action against a magazine for the unauthorized use of his photograph.

82 Misc. 2d at 1055, 372 N.Y.S.2d at 419 (citation omitted).

It is the established law of New York that the unauthorized use of an individual's name or picture is not for "a trade purpose," and thus not violative of section

51, if the name or picture is used in connection with an item of news or some other newsworthy event. *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359, 107 N.E.2d 485, 488 (1952). *Accord, Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). In the instant action, however, there is no such informational or newsworthy dimension to Chuckleberry's unauthorized use of plaintiff's name. Rather, the plaintiff's name was used solely for the purpose of enhancing the sales of the magazine.

In *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978), which involved the unauthorized use of plaintiff Muhammed Ali's likeness in *Playgirl* magazine, the court stated that:

> The picture is a dramatization, an illustration falling somewhere between representational art and cartoon, and is accompanied by a plainly fictional and allegedly libellous bit of doggerel. Defendants cannot be said to have presented 'the unembroidered dissemination of facts' or 'the unvarnished, unfictionalized truth . . . .' The nude portrait was clearly included in the magazine solely "for purposes of trade—*e.g.*, merely to attract attention."

427 F. Supp. at 727 (citiations omitted). In the instant case, Chuckleberry's use of plaintiff's name is similarly fictionalized in that plaintiff does not appear in any of the photographs which were represented to be her, and the use of her name was for a commercially exploitive effect rather than for the purpose of informing the public about a newsworthy event. There is no question that plaintiff's name was used for purposes of trade.

The third and final element is the absence of consent. It is undisputed that plaintiff did not give the defendants any consent, written or otherwise, to use her name in *Adelina,* and in my opinion it is irrelevant whether or not plaintiff gave a release to MPI. Even if it is assumed that plaintiff did give a release to MPI in Luxemburg for material published in Italy, that release could not be relied on by defendants with respect to their publication of a different magazine in New York. Sections 50 and 51 clearly require a person or company desiring to use a person's name, portrait or picture for trade or advertising purposes to *first* obtain that person's written consent. In the case at bar, the defendants did not *first* obtain the plaintiff's written consent to their usage of her name; the fact that she may have granted a release to some other company is immaterial.

Although the issue is not pursued in the defendants' joint memorandum of law, the defendant Publishers maintains that since it merely distributed the issue of *Adelina* in question, it did not "use" plaintiff's name within the meaning of section 51 and therefore is not subject to liability. This position, however, must be rejected. Publishers presumably distributed the magazine for profit; since plaintiff's name appeared on the cover of and in the magazine, Publishers "used" her name. The fact that Publishers may not have known that the plaintiff's name was being used without her consent and in the manner in which it was used is irrelevant to the questions of compensatory damages and injunctive relief. That knowledge is not an element of a cause of action for damages and injunctive relief is clear from the fact that the statute expressly requires knowledge for exemplary damages:

> [I]f the defendant shall have knowingly used such person's name, portrait or picture [for advertising or trade purposes without first obtaining

written consent], the jury, in its discretion, may award exemplary damages.

N.Y. Civil Rights Law §51 (McKinney Supp. 1979-1980). The clear inference is that a plaintiff need not establish knowledge to obtain compensatory and injunctive relief. Accordingly, Publishers is not relieved of liability merely because it purportedly did not know that plaintiff's name was used without consent and in the manner that it was used.

CONCLUSION

The plaintiff having submitted a sworn affidavit and exhibits demonstrating that she is entitled to relief, and the defendants having failed to show that genuine issues of fact exist as to the claim of statutory invasion of privacy, the motion for partial summary judgment is granted.

Chuckleberry's cross-motion to compel discovery is granted. Plaintiff is directed to appear for the taking of her deposition and to produce or object to the documents requested by Chuckleberry by September 15, 1980.

Plaintiff's request for an expedited trial is at this juncture denied. Counsel for the parties are directed to appear for a pretrial conference on September 26, 1980 at 12 noon in Room 2603 of the U.S. Courthouse.

So ordered.

Dated: New York, New York
July 31, 1980

HENRY F. WERKER
U.S.D.J.

Memorandum Decision, United States District Court, Southern District of New York, dated September 2, 1980.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JACKIE COLLINS LERMAN,

Plaintiff,

against

CHUCKLEBERRY PUBLISHING, INC., and PUBLISHERS DISTRIBUTING CORPORATION,

Defendants.

80 Civ. 1658 (HFW)
7285 Dated: 9/2/80

Appearances: (See last page).

HENRY F. WERKER, D. J.:

This is a motion for reconsideration of that portion of my opinion and order dated July 31, 1980 which granted summary judgment for the plaintiff Jackie Collins Lerman on her invasion of privacy claim against the defendant Publishers Distributing Corporation ("Publishers"). Publishers contends that a defendant cannot be liable

under section 51 of the New York Civil Rights Law unless he has knowledge that a plaintiff's name or likeness is being used without consent for trade purposes. Publishers thus finds fault with the court's holding that it is liable under section 51 even though it may not have known all the circumstances surrounding the publication of plaintiff's name in *Adelina* magazine.

At the outset, the court notes that the authorities relied on by Publishers in support of this motion were not brought to the court's attention in the papers in support of the original motion. Indeed, the argument that Publishers cannot be liable since its role was merely that of a distributor was not pursued at all in the memorandum of law accompanying the original motion papers. Yet, most of the authorities presently relied on by Publishers were available to it at that time, and Publishers certainly had an opportunity then to raise the arguments raised now.[1] Hence, Publishers current efforts to avoid liability are somewhat untimely, and this would be reason enough to deny the motion.

In any event, the arguments presently raised must be rejected even when considered on their merits. In contending that a distributor's liability is narrowly limited, Publishers relies primarily on defamation cases and authorities. Since the court's July 31st opinion was concerned only with plaintiff's statutory invasion of privacy claim, these defamation cases and authorities are not on point. Publishers has not cited any case involving the liability of a distributor (who was not also the publisher) under sections 50 and 51 of the New York Civil Rights Law. Moreover, Publishers fails to address the fact that while the language of section 51 expressly requires knowledge for exemplary damages, no such requirement is set forth

[1]It should be pointed out that Publishers' attorneys on this motion for reconsideration were not involved on the original motion.

for compensatory and injunctive relief. In the absence of caselaw holding otherwise, section 51 can only be read to require knowledge for exemplary damages but not for compensatory and injunctive relief.

Publishers argues strenuously that there cannot be liability under sections 50 and 51 absent proof of fault. The court does not disagree with this proposition. However, it is clear that fault has been established. The issue of fault or intent to capitalize on a plaintiff's name is part of the element of use for purposes of advertising or trade. A defendant who uses a plaintiff's name coincidentally has no intent to capitalize on the plaintiff's name, and thus is not using the name for purposes of trade within the meaning of the statute. In the instant case, the defendant Chuckleberry Publishing, Inc. ("Chuckleberry") did indeed use the plaintiff's name for purposes of trade, clearly with the intent to capitalize on her name. To the extent that Publishers was involved as an agent of Chuckleberry in distributing the magazine, Chuckleberry's fault must be imputed to Publishers and Publishers must be responsible for any injury to the plaintiff. If, as between Publishers and Chuckleberry, Publishers is the less culpable party, that fact will be reflected in any award and apportionment of damages.

Publishers renews the argument pressed on the original motion that the plaintiff is a public figure and that consequently recovery is barred absent a showing of actual malice. Even assuming the plaintiff is a public figure, this argument must nevertheless be rejected. To recover under the New York invasion of privacy statute, a public figure who is the subject of a false news report or other incorrect informational presentation must indeed prove knowledge of the falsity or a reckless disregard of the truth. *Time, Inc. v. Hill,* 385 U.S. 374, 387-88 (1967); *Spahn v. Julian Messner, Inc.,* 21 N.Y.2d 124, 127, 233 N.E.2d 840, 842,

286 N.Y.S.2d 832, 834 (1967), *appeal dismissed*, 393 U.S. 1046 (1969). However, a person is not stripped of his right of privacy merely because he becomes a public figure, *Reilly v. Rapperswill Corp.*, 50 App. Div. 2d 342, 345, 377 N.Y.S.2d 488, 491-92 (1st Dep't 1975); *Youssoupoff v. Columbia Broadcasting System, Inc.*, 48 Misc. 2d 700, 703, 265 N.Y.S.2d 754, 758 (1965), and the actual malice requirement does not extend to situations where, as here, the name of a public figure is being used in a completely exploitive, commercial fashion. *See Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727-28 (S.D.N.Y. 1978), and cases cited therein. *Compare Ann-Margaret v. High Society Magazine, Inc.*, No. 80 Civ. 27 (GLG) (S.D.N.Y. Aug. 27, 1980) (plaintiff, a well-known actress, chose to appear partially nude in a motion picture; reprint of a photograph of that scene in defendants' "tacky" but not "pornographic" magazine did not give rise to a cause of action under section 51).

The motion for reconsideration is denied.
So Ordered.

Dated: New York, New York
September 2, 1980

HENRY F. WERKER
U.S.D.J.

Appearances:

Attorneys for Plaintiff, Grutman & Schafrann, 595 Park Avenue, New York, New York 10022 and Felix C. Ziffer, 122 East 78th Street, New York, New York 10021 by: Jeffrey H. Daichman of counsel.

Attorneys for Publishers, Greenbaum, Wolff & Ernst, 437 Madison Avenue, New York, New York 10022 by: Marcia B. Paul, Jerry Simon Chasen of counsel.

Opinion of the United States District Court, Southern District of New York, dated August 17, 1981.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JACKIE COLLINS LERMAN,

Plaintiff,

against

CHUCKLEBERRY PUBLISHING, INC., and PUBLISHERS DISTRIBUTING CORPORATION,

Defendants.

80 Civ. 1658
August 17, 1981

Appearances: (See last page).

HENRY F. WERKER, D. J.:

This action for libel, invasion of privacy and violation of the right of publicity was brought by plaintiff Jackie Collins Lerman, a citizen of the United Kingdom, against New York defendants Chuckleberry Publishing Inc. ("Chuckleberry") and Publishers Distributing Corporation ("PDC"). This Court granted plaintiff's motions for

a preliminary injunction on March 31, 1980 and for partial summary judgment on her invasion of privacy claims against defendants under §§ 50 and 51 of the New York Civil Rights Law on July 3, 1980. Subsequently, this Court denied defendants' motion for reconsideration on September 2, 1980. *Lerman v. Chuckleberry Publishing Co.*, 496 F. Supp. 1105 (S.D.N.Y. 1980).

This case is presently before the court on several motions. First, plaintiff moves for leave to amend her original complaint pursuant to Fed. R. Civ. P. 15(a). Second, defendants PDC and Chuckleberry move for summary judgment pursuant to Fed. R. Civ. P. 56 on the issues of libel and violation of the right of publicity. Third, plaintiff moves, pursuant to Fed. R. Civ. P. 37 for an order striking the answer and counterclaim of defendant Chuckleberry, entering a default judgment against Chuckleberry and awarding plaintiff the reasonable expenses, including attorney's fees, caused by the failure of Chuckleberry to comply with discovery orders in this action. Finally, defendant PDC cross moves for an order, pursuant to Fed. R. Civ. P. 37, 30, 42, 45 and 55 to preclude co-defendant Chuckleberry from opposing PDC's cross-claim for indemnity and ordering that judgment be entered thereupon if PDC is found liable to plaintiff; awarding PDC attorneys' fees in the amount of $1,000; severing the claims of plaintiff against PDC from plaintiff's claims against Chuckleberry for trial; and staying trial against PDC pending an inquest on damages against Chuckleberry.

This action arises from the publication of a picture of a nude woman, incorrectly identified as plaintiff, in the May, 1980 issue of *Adelina*, and the publication of plaintiff's name on the cover of *Adelina* under the heading "In the Nude" from the Playmen Archives." The May, 1980 issue of *Adelina* was published and distributed by defend-

ants Chuckleberry and PDC respectively. The details of the dispute between these parties are set forth in this court's decision dated July 3, 1980, *Lerman v. Chuckleberry Publishing Co.*, 496 F.Supp. 1105 (S.D.N.Y., 1980), and this decision assumes familiarity with the prior opinion.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Plaintiff's Rule 15(a) motion for leave to amend the complaint is based on the republication, without plaintiff's consent, of the cover of the May, 1980 issue of *Adelina,* subsequent to the commencement of this lawsuit, in advertisements for the sale of *Adelina* in the June, 1980 and January, 1981 issues of *Adelina* and in the February/March, 1981 issue of *Rooster,* the new title of *Adelina.* The statement "In the Nude from the Playmen Archives . . . Jackie Collins" is clearly visible in the advertisements.

Although plaintiff has moved to amend the complaint it appears that the causes of action she seeks to assert are based on events arising after the date the first amended pleading was filed. Thus, the motion to amend will be treated as a motion to serve a supplemental pleading pursuant to Fed. R. Civ. P. 15(d).

Defendant PDC opposes plaintiff's motion on four grounds: (1) that plaintiff failed to comply with Civil Rule 3(b) by bringing her motion by notice and affidavit with no supporting memorandum of law; (2) that the additional claims are legally insufficient; (3) that plaintiff has unduly delayed in filing this motion; and (4) that PDC will suffer prejudice if this court grants plaintiff leave to amend. I do not find any of these grounds sufficiently compelling and grant plaintiff leave to supplement her original complaint. Under Rule 15(d), the court in its determination may grant

leave to file a supplemental pleading at any time during which the proceeding is before the court, when to do so "will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." C. Wright & A. Miller, 6 *Federal Practice and Procedure* § 1504 (1971).

While a failure to "serve and file with the motion papers a memorandum setting forth the points and authorities relied on . . . may be deemed sufficient cause for the denial of the motion" in appropriate cases, Civil Rule 3(b), I do not find this to be such a case. This motion was brought to the court's attention by letter and subsequently discussed at a pretrial conference held on March 27, 1981 at which time the court indicated that plaintiff's motion to amend would be favorably entertained. Under the circumstances, denial of the motion would be inappropriate.

PDC's arguments addressing the sufficiency of the proposed supplements to the complaint are unavailing on the instant motion. Unless a proposed amendment is clearly frivolous or legally insufficient on its face, the substantive merits of a claim or defense should not be considered on a motion to amend. *Nyscoseal, Inc. v. Parke, Davis & Co.*, 28 F.R.D. 24, 25 (S.D.N.Y. 1961). None of plaintiff's claims here appear to be frivolous. Moreover, PDC's argument that it was not the distributor of the June, 1980 issue of *Adelina* is a question of fact to be determined on the merits and not at this stage of the litigation.

In addition, it does not appear that plaintiff has unduly delayed in making this motion. The cover of *Adelina* on which plaintiff's name appeared was republished three times subsequent to the granting of the preliminary injunction and the filing of the original complaint, with the last republication occurring in January 1981. Plaintiff's claims

concerning the republications hardly present new issues as PDC argues. Rather, these additional claims arise out of the same series of transactions and simply conform the pleadings to the evidence subsequently brought to light. Furthermore, as the motion to amend was made while summary judgment motions were pending before the court, PDC's allegation that plaintiff has purposely waited "until the eve of trial" to move for leave to amend is without merit. Finally, PDC does not claim that it will be prejudiced in any particular way such as extensive additional discovery, inability to prepare a case on the issues, or the added expense or burden of a more complicated and lengthy trial. In light of the above, plaintiff's motion to supplement the complaint is granted.

MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is to be granted only where there is no genuine issue of material fact. *SEC v. Research Automation Corp.*, 585 F.2d 31 (2d Cir. 1978). The evidence presented must be considered in the light most favorable to the nonmoving party "with the burden on the moving party to demonstrate the absence of any factual issue genuinely in dispute." *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

RIGHT OF PUBLICITY

Courts in this circuit, interpreting New York law, have recognized a common law "right of publicity" as distinct from the statutory right of privacy under §§50 and 51 of the New York Civil Rights Law. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978); Nimmer, *The Right of*

Privacy, 19 Law & Contemp. Prob. 203 (1954). The right of publicity comprises a person's right to own, protect and commercially exploit his own name, likeness and persona. In *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 576 (1977), the Supreme Court noted that the state's interest in protecting an individual's right of publicity " 'is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.' " *Id.* (quoting Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemp. Prob. 326, 331 (1966)).

An individual claiming a violation of his right of publicity must show: (1) that his name or likeness has publicity value; (2) that he himself has "exploited" his name or likeness by acting "in such a way as to evidence his . . . own recognition of the extrinsic commercial value of his . . . name or likeness, and manifested that recognition in some overt manner . . ." *Hicks v. Casablanca Records,* 464 F. Supp. 426, 429 (S.D.N.Y. 1978); *see Factors Etc., Inc. v. Creative Card Co.,* 444 F. Supp. 279, 283 (S.D.N.Y. 1977); *Factors, Etc., Inc. v. Pro Arts, Inc.,* 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd,* 579 F.2d 215 (2d Cir. 1978), *cert. denied,* 440 U.S. 908 (1979); and (3) that defendant has appropriated this right of publicity, without consent, for advertising purposes or for the purposes of trade. *Ann-Margret v. High Society Magazine, Inc.,* 498 F. Supp. 401, 406 (S.D.N.Y. 1980).

A close scrutiny of the numerous press releases, interviews, and newspaper and magazine articles written about plaintiff Jackie Collins Lerman leads me to conclude that the name and persona of this celebrated novelist and screenwriter, whose picture, at one time, graced even the subway stations of New York, is commercially valuable,

or, stated differently, has publicity value. Thus, plaintiff has established the first element of the cause of action. Plaintiff's use of her name and likeness on posters, on the jackets of her novels and in interviews in connection with the marketing of her books and screenplays sufficiently establishes the second element of the cause of action, self-exploitation for the purposes of her claimed right of publicity.

The third element of plaintiff's claim, use of plaintiff's likeness by defendants for purposes of trade, has already been determined by this court. In granting plaintiff's motion for partial summary judgment on the issue of invasion of privacy, defendants' use of plaintiff's name in the May, 1980 issue of *Adelina* was found to be "solely for the purpose of enhancing the sales of the magazines . . . for a commercially exploitive effect rather than for the purpose of informing the public about a newsworthy event." *Lerman v. Chuckleberry Publishing, Inc.*, 496 F.Supp. at 1108.

Having concluded that no genuine issues of fact exist with regard to plaintiff's cause of action for violation of her right of publicity, I grant summary judgment in favor of plaintiff on this claim as a matter of law. PDC's motion and Chuckleberry's cross-motion[1] for summary judgment pursuant to Fed. R. Civ. P. 56 on the issue of right of publicity are denied.

LIBEL

Whether the plaintiff in a libel action is a public or private figure is a question of law to be determined by the court. *Wolston v. Reader's Digest Association,* 578 F.2d 427, 429 (D.C. Cir. 1978), *rev'd on other grounds,* 443

[1]Chuckleberry has not submitted its own arguments or legal authorities but relies instead on the papers submitted by PDC.

U.S. 157 (1979); *Hotchner v. Castillo-Puche,* 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975), *rev'd on other grounds,* 551 F.2d 910 (2d Cir. 1977).

Defendant PDC contends that Jackie Collins Lerman is a public figure for purposes of her libel claim and thus the standard to be applied in determining defendants' potential liability is that of "actual malice" as set forth in *New York Times v. Sullivan,* 376 U.S. 254, 279-80 (1964); *see Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). Under the *New York Times* test, a public figure may recover damages for libel only if he can prove with "convincing clarity" that the defamatory publication "was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* Characterizing "(t)hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention" as public figures, the Court, in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342 (1974), delineated two classes of public figures to which the "actual malice" standard applies. The first is public figures for all purposes, or those who have achieved "pervasive fame or notoriety." The second is public figures "for a limited range of issues," or those who voluntarily inject themselves or are drawn into the forefront of a "public controversy." In this latter class of "limited purpose" public figures, the relevant examination turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz v. Robert Welch, Inc.,* 418 U.S. at 352; *Wolston v. Reader's Digest Association, Inc.,* 443 U.S. 157, 167 (1979).

PDC concedes that although Jackie Collins Lerman is well-known in some circles, not having achieved "general fame or notoriety in the community and pervasive involvement in the affairs of society," *Gertz v. Robert Welch,*

Inc., 418 U.S. at 351-52, she cannot be considered "one of that small group of individuals who are public figures for all purposes." *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 165 (1979). Instead, PDC argues that plaintiff is a limited purpose public figure because she has "thrust [herself] to the forefront of [a] particular public [controversy] in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345. According to PDC, plaintiff's status as the writer of standard, rather pedestrian pornography and her frank discussions of sexuality in interviews in connection with her books make plaintiff a public figure for the limited purpose of promoting, publicizing and selling sex.

As recently reiterated by the Supreme Court, is it the "particular controversy giving rise to the defamation" that must be considered in analyzing a libel plaintiff's status. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. at 167. In this case the defamation arose from a pictorial essay entitled "Archives" in the May, 1980 issue of the magazine *Adelina*. The article purports to display erotic and nude photographs of well-known actresses who, "in the coming of age of American film-making - and American audiences - . . ., were given the opportunity to free their natural ability to express sexuality." Thus was presented "the pleasing result of this liberated attitude."

This introduction to the pictorial essay indicates that the particular public controversy giving rise to the defamation in this case, if it can be said that one exists at all, concerns the sexual liberation of actresses in American film. We must now examine whether this can be considered a public controversy and if so, whether plaintiff has thrust herself to the forefront of the controversy.

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, the

> outcome of which affects the general public or some segment of it in an appreciable way. . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention. *Time Inc. v. Firestone,* 424 U.S. 448, 454-55 . . . (1976). Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.
>
> Courts must exercise care in deciding what is a public controversy. Newsworthiness alone will not suffice, ...

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980), *cert. denied,* 101 S. Ct. 266 (1980).

It is difficult to conclude that the issue of sexual liberation of actresses in American film is more than a matter of general public interest that may be newsworthy. In my opinion, it simply cannot be said that there is a real dispute with respect to this matter, the outcome of which affects the general public or some segment in an appreciable way. Indeed, public concern about the sexual liberation of actresses in American film certainly is no greater than the concern "shared by most" about the expenditure of public funds by federal agencies which was held to be insufficient to make the plaintiff in *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), a public figure.

Furthermore, Lerman "at no time assumed any role of public prominence in the broad question of concern," *id.* at 135, if one can be said to exist, about the sexuality of actresses in American film. Lerman did not write about the sexual liberation of actresses on the screen and certainly did not inject her views into a controversy on this topic. Lerman herself never modeled and although she had a brief acting career, it does not appear that she ever ap-

peared nude on the stage or the screen. Finally, although Lerman was photographed on several occasions for publicity purposes, she was never photographed in the nude.

Defendant's contention that plaintiff is a public figure for the limited purpose of promoting, publicizing and selling sex must be rejected. First, as discussed above, such a general characterization of the public controversy does not isolate with the required particularity, the controversy which gave rise to the defamation in this case. Second, the consequence of adopting defendants' analysis would be to expose any prominent author of novels about human sexuality who engages in conventional promotional activities to publicize them to the risk that intimate details of his personal life may be disclosed falsely by a news media clothed with the protections of *Times v. Sullivan* and its progeny. This result would be improper where the author has not injected his personal conduct or his own nudity into the public discussion. Furthermore, such an approach would undermine the legitimate interests of the states in protecting their citizenry from "the harm inflicted . . . by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341.

> "had acquired the materials from an . . . agent of Media Press International. . . . Our licensor has dealt with this company over a period of ten years and has never had an incident in which a claim was made with respect to materials published that a prior consent had not been obtained. Therefore, when our licensor published the materials in August 1979, they had every reason to believe that said publication was in all respects legally proper. When we republished said materials, we, likewise had reason to believe that we had a full and complete legal right to do so. . . ."

Id. at ¶ 9.

From the foregoing, it appears that Chuckleberry was the republisher of the defamation originally published in *Playmen*. Accordingly, under New York law, it was entitled to rely on the research of the publisher, Tatillo Editrice SPA, unless it is demonstrated that Chuckleberry "had or should have had substantial reasons to question the accuracy of the article." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d at 550, 416 N.E.2d at 566, 435 N.Y.S. 2d at 565-66. Although the president of Chuckleberry has stated that Chuckleberry believed it had every right to republish the photographs in the May, 1980 issue of *Adelina* and did so in good faith, I find this an insufficient basis upon which to grant a motion for summary judgement. As the Supreme Court has noted in an analogous situation:

> [t]he defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

St. Amant v. Thompson, 390 U.S. 727, 732 (1968). In this case, it appears that there is a factual question as to whether Chuckleberry should have had substantial reason to question the accuracy of the article, especially because the caption under the picture misidentified the author of the novel and screenplay "The World is Full of Married Men." In addition, numerous factual questions exist concerning Chuckleberry's use of the cover of the May, 1980 issue of *Adelina* in advertisements in subsequent issues since it appears that this action was pending at the time the latter issues were published.

On the other hand, plaintiff has not disputed the affidavit of Julius L. Ross, President of PDC, which establishes that PDC neither knew nor had notice of the defamation contained in the May, 1980 issue of *Adelina*. Futhermore, I find that plaintiff has failed to raise a question of fact as to whether PDC, under the circumstances, should have been on notice that the publisher was unreliable. *See* Affid. of Julius L. Ross, sworn to March 28, 1980 at # 6. Consequently, summary judgment is granted for PDC on this issue.

With respect to the issues of *Adelina* that contained the advertisement using the cover of the May 1980 issue, PDC contends that it was no longer the distributor and cannot be held liable for any damages arising from these publications. While this may be the case, the deposition statements of Eugene Ford do not establish with certainty the date on which Flynt assumed total responsibility for distribution of *Adelina*. Thus, the nature and extent of PDC's role in the distribution of the June, 1980 issue of Adelina as well as the subsequent issues which are claimed to be defamatory are unclear. In addition, I find that questions of fact clearly are presented with respect to whether special circumstances existed requiring PDC to review the content of the issues of *Adelina* published after the May 1980 issue. In light of the foregoing, summary judgment must be denied with respect to plaintiff's claims concerning the June, 1980, and January 1981 issues of *Adelina* and the February/March 1981 issue of *Rooster* magazine.

A comparison of the facts in this case with those in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), is instructive. Gertz was a well-known attorney who had long been active in community and professional affairs, had published numerous books and articles on legal, political and literary subjects, was the subject of countless interviews, and consequently was well-known in certain circles.

Nevertheless, he was found to be a private figure because he had not thrust himself to the forefront of the particular controversy which gave rise to the defamation. Similarly, in this case, although plaintiff is a successful novelist among a limited circle of readers, and has achieved some notoriety as a result of her views and works, she cannot be considered a public figure because she did not thrust herself to the forefront of a controversy concerning the sexual liberation of actresses in American film. *See Time Inc. v. Firestone,* 424 U.S. 448, 453 (1976).

Thus, although plaintiff has a "public image" which has been exploited for the purpose of marketing her popular novels, defendants have not shown that plaintiff has thrust herself to the forefront of a public controversy such as to render her a limited purpose public figure for first amendment purposes. I, therefore, must conclude that plaintiff is a private figure for purposes of determing defendants' liability on the issue of libel.

Having determined that plaintiff is a private figure for purposes of first amendment analysis, the court must turn to New York law for the standards by which PDC's and Chuckleberry's conduct must be examined. Under New York law, publishers of defamatory falsehoods about a private individual in matters of legitimate public interest, may be held liable upon a showing that "the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 63-64 (1975).

The New York courts have further limited the responsibility of republishers and distributors of defamatory statements. With a respect to republishers, the New York courts hold that "a company or concern which simply

republishes a work is entitled to place its reliance upon the research of the original publisher, absent a showing that the republisher 'had, or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of [the] reporter.' " *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 550, 416 N.E.2d 557, 566, 435 N.Y.S.2d 556, 565-66 (1980) (quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 952, *cert. denied*, 434 U.S. 969 (1977)).

With respect to distributors, the New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation. *Balabanoff v. Fossani*, 192 Misc. 615, 81 N.Y.S.2d 732 (1948); *see Lewis v. Time, Inc.* 83 F.R.D. 455 (E.D. Cal. 1979); Restatement (Second) of Torts § 581 (1976). As discussed in the Restatement:

> [A] news dealer is not liable for defamatory statements appearing in the newspapers or magazines that he sells if he neither knows nor has reason to know of the defamatory article. The dealer is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items. Unless there are special circumstances that should warn the dealer that a particular publication is defamatory, he is under no duty to ascertain its innocent or defamatory character. On the other hand, when a dealer offers for sale a particular paper or magazine that notoriously persists in printing scandalous items, the vendor may do so at the risk that any particular issue may contain defamatory language.

Id. at Comment d.

The conduct of Chuckleberry and PDC must be evaluated in accordance with these standards and if any genuine issues exist as to the material facts, summary judgement must be denied.

According to the affidavit of Walter Zacharias, the former President of Chuckleberry, the pictures which purport to be photographs of plaintiff that were published in the May, 1980 issue of *Adelina* were acquired by Chuckleberry from its licensor Tattilo Editrice SPA, the publisher of the Italian magazine, *Playmen*. The pictures previously had been published in the August 1979 issue of *Playmen* and Chuckleberry published them "by reason of the prior publication of materials by its licensor." Affid. of Walter Zacharias, sworn to March 28, 1980 at ¶ 2. As stated by Zacharias, Tattilo Editrice SPA:

RULE 37 MOTIONS

Plaintiff has moved for an order pursuant to Fed. R. Civ. P. 37(d), striking Chuckleberry's answer and counterclaim. PDC similarly has moved for an order pursuant to Rule 37 precluding Chuckleberry from opposing PDC's cross-claim for indemnity and severing plaintiff's claims against PDC from its claims against Chuckleberry for trial pursuant to Fed. R. Civ. P. 42(b) and for other and further related relief. These motions are the result of the continued inability of plaintiff to obtain the deposition of Chuckleberry's president, Seymour Butan, PDC claims that its ability to prepare its defense for trial and its arguments in support of its motion for summary judgment have been substantially impaired as a result of Chuckleberry's failure to submit to deposition by plaintiff.

Plaintiff attempted unsuccessfully to obtain Chuckleberry's deposition from September, 1980 through January, 1981. On January 16, 1981, a pretrial conference was held before this court. Richard Waxman, Esq. of Goldschmidt, Fredericks, Kurzman & Oshatz, appeared on behalf of Chuckleberry. The court directed plaintiff at this conference to serve Mr. Butan with a subpoena and stated that a motion to strike Chuckleberry's answer would be entertained if the subpoena was not obeyed.[2] The subpoena was served setting a deposition date of February 20, 1981. This subsequently was adjourned at Chuckleberry's request to March 5, 1981 and then to March 10, 1981. Attorneys for Chuckleberry and PDC and the court reporter arrived at plaintiff's attorney's office at the scheduled time on March 10, 1981 but Mr. Butan failed to appear and also failed to telephone to explain his absence.

Chuckleberry's affidavit in opposition to plaintiff's motion to strike its answer and counterclaim states that Mr. Butan's non-appearance was based on a "medical emergency".[3] Chuckleberry, however, did not submit a doctor's report or any other proof to document the nature and extent of this emergency.

Under Fed. R. Civ. P. 37, the court, in its discretion, may impose "just" sanctions against a party who "fails to obey an order to provide or permit discovery". Only where a party has acted willfully, in bad faith or with deliberate disregard of a court order should the sanction of judgment by default for failure to comply with a discovery order be employed. This remedy should not be

[2]Mr. Waxman claims in his affidavit that he is "not aware of any order compelling the deposition of Mr. Butan." Such an order was made by this court at the pretrial conference on January 16, 1981.

[3]This "medical emergency" allegedly resulted from a "severe hemorrhoidal condition, making it impossible for him to sit for any extended period of time."

invoked where failure to comply is due to inability to comply. *Societe Internationale v. Rogers,* 357 U. S. 197, 212 (1958).

In view of the foregoing, Chuckleberry is ordered to submit an affidavit of Mr. Butan's treating physician setting forth the nature and extent of his purported March 10, 1981 "medical emergency." Failure to submit this affidavit within twenty days of the filing of this opinion will result in the dismissal of Chuckleberry's answer and counterclaim to plaintiff's complaint. In the event that such medical proof is satisfactory to this court, Chuckleberry will be given one further opportunity to submit to deposition.

Because of Chuckleberry's persistent forestalling of the discovery proceedings and for the failure of Mr. Butan to telephone plaintiff's attorney on March 10, 1981, reasonable costs, including attorneys' fees, are imposed on Chuckleberry. Plaintiff and PDC are to submit affidavits to this court setting forth expenses and fees incurred at the March 10 aborted depositions in accordance with the above.

PDC's motion to preclude Chuckleberry from opposing its cross-claim for indemnity, for severance of plaintiff's claims against it pursuant to Fed. R. Civ. P. 42(b), for a stay of trial against PDC pending a hearing on inquest against Chuckleberry pursuant to Fed. R. Civ. P. 55(b) and for entry of judgment against Chuckleberry pursuant to Fed. R. Civ. P. 54(b) are denied. While the inconvenience to PDC caused by Chuckleberry's failure to submit to deposition by plaintiff is not disputed, it does not appear that PDC has been significantly prejudiced by Chuckleberry's failure to submit to the March 10, 1981 deposition. First, it does not appear that PDC has been hampered in its defense to plaintiff's claims. Second, since PDC's claims against Chuckleberry for indemnity involve

issues that are separate and distinct from plaintiff's claims against Chuckleberry, it is unlikely that Chuckleberry's failure to appear for deposition by plaintiff has adversely affected PDC's case against Chuckleberry. Finally, although it appears that Chuckleberry is reluctant to appear for a deposition by the plaintiff, there is no indication that Chuckleberry would fail to respond to a deposition noticed by PDC. Thus, PDC's motion for sanctions is denied.

CONCLUSION

In accordance with the above, plaintiff's motion to amend her complaint is granted. PDC's and Chuckleberry's motions for summary judgment on plaintiff's right of publicity claim are denied and summary judgment is granted for plaintiff on this claim. PDC's and Chuckleberry's motions for summary judgment on plaintiff's libel claims are denied. PDC's motion for sanctions against Chuckleberry is denied. However, plaintiff's motion for sanctions against Chuckleberry is granted unless Chuckleberry submits satisfactory proof, as directed above, that its failure to appear for the March 10, 1981 deposition noticed by plaintiff was in fact the result of a medical emergency.

SO ordered.

Dated: New York, New York
August 17, 1981

HENRY F. WERKER
U.S.D.J.

Appearances:

Attorneys for Plaintiff, Grutman Schafrann & Miller, 505 Park Avenue, New York, New York 10022 by Jeffrey H. Daichman of counsel.

Attorneys for Chuckleberry, Goldschmidt, Fredericks, Kurzman & Oshatz, 655 Madison Avenue, New York, New York 10021 by: Richard Waxman of counsel.

Attorneys for PDC, Greenbaum, Wolff & Ernst, 437 Madison Avenue, New York, New York 10022 by: Marcia B. Paul, Jerry Simon Chasen of counsel.

Memorandum Decision of the United States District Court, Southern District of New York, dated June 3, 1982.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JACKIE COLLINS LERMAN,

Plaintiff,

against

CHUCKLEBERRY PUBLISHING, INC., and PUBLISHERS DISTRIBUTING CORP.,

Defendants.

897

80 Civ. 1658 (HFW)

JACKIE COLLINS LERMAN,

Plaintiff,

against

FLYNT DISTRIBUTING CO., INC.,

Defendant.

81 Civ. 2281 (HFW)

Appearances: (See last page).

HENRY F. WERKER, D. J.:

These two actions are before the court on (1) plaintiff's motions to amend the complaint in *Lerman v. Chuckleberry,* No. 80 Civ. 1658 to add Flynt Distributing Company ("Flynt") as a party defendant; (2) plaintiff's motion to consolidate the two actions; and (3) plaintiff's and Flynt's cross-motions for partial summary judgment in *Lerman v. Flynt Distributing Co.*, No. 81 Civ. 2281.

BACKGROUND

The first of these two actions, *Lerman v. Chuckleberry Publishing Inc.*, No. 80 Civ. 1658 (the "Chuckleberry action") was commenced by plaintiff in March, 1980, against Chuckleberry Publishing Inc. ("Chuckleberry") and Publishers Distributing Co. ("PDC"), for libel, violation of the right of publicity and invasion of privacy arising from the publication of the May 1980 issue of "Adelina" magazine. That action has been the subject of two prior opinions and reader familiarity with them is assumed.[1]

The second action was commenced by plaintiff in April, 1981, against Flynt to recover damages for libel, violation of the right of publicity and invasion of privacy. The action arises from Flynt's alleged role in distributing the June 1980 and January 1981 issues of "Adelina" which, as part of an advertisement for the sale of "Adelina", contained reprints of the allegedly libelous cover of the May, 1980, issue of "Adelina".

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Plaintiff has moved in the *Chuckleberry* action to amend the complaint to assert causes of action against Flynt for libel, invasion of privacy under sections 50 and 51 of the N. Y. Civil Rights Law, and violation of the right of publicity based upon Flynt's alleged participation in the distribution of the May 1980 issue of "Adelina". For the reasons that follow, this motion is granted.

Plaintiff asserts that she commenced this action against Chuckleberry and PDC on the basis of the Table of Contents of "Adelina" which states that "Adelina" was published by Chuckleberry and distributed by PDC. She

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[1] *See Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228 (S.D.N.Y. 1981) and *Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. 1105 (S.D.N.Y. 1980).

further asserts that it was not until she received Flynt's response to interrogatories in September 1981, in the *Flynt* action that she became aware of Flynt's role in the distribution of the May 1980 issue of "Adelina". *See* Exhibit D to affid. of Jeffrey Daichman, sworn to December 24, 1981.

Flynt has opposed the motion to amend on the ground that plaintiff should not be permitted to avoid the one year statute of limitations on her claims arising from publication of the May 1980 issue of "Adelina" by amending the complaint in the *Chuckleberry* action and relying on the relation-back provision of Rule 15(c).

Flynt further argues that the motion to amend should be denied because (1) the amendment is unsupported factually; (2) it is a tactical effort to circumvent the possible denial of plaintiff's motion to consolidate; and (3) amendment at this juncture would be prejudicial to Flynt.

Flynt's argument that the proposed amendment is unsupported factually is unpersuasive. Unless a proposed amendment is clearly frivolous or legally insufficient on its face, the substantive merits of a claim or defense should not be considered on a motion to amend. *Nyscoseal, Inc. v. Parke, Davis & Co.*, 28 F.R.D. 24, 25 (S.D.N.Y. 1961). Plaintiff's claims here are not frivolous. They are based on an admission contained in Flynt's answers to interrogatories. In light of that admission, the affidavit of Gerald Awang, sworn to January 28, 1981, merely raises questions of fact and credibility to be determined on the merits and not at this stage of the litigation.

Flynt's contentions with respect to consolidation also are without merit. The court's analysis must rest on the relative merits of the parties' contentions with an eye to judicious resolution of their claims rather than on an evaluation of the tactical manueverings of their attorneys.

Similarly, Flynt's allegation of prejudice from amendment at this point in the proceedings is unavailing. The

fact that the amendment may add another issue to the case and require further pre-trial proceedings is an insufficient basis to deny amendment under the circumstances presented by this case. In the absence of specific and compelling allegations of prejudice, such as some undue disadvantage in the presentation of a defense to the claims sought to be asserted, leave to amend should be granted. *See Iodice v. Calabrese,* 345 F. Supp. 248, 259 (S.D.N.Y. 1972), *aff'd in part, rev'd in part on other grounds,* 512 F. 2d 383 (2d Cir. 1975).

Flynt's contention with respect to the statute of limitations also is unavailing. If plaintiff had never commenced the subsequent action against Flynt for the June, 1980, and January, 1981, issues of "Adelina" there would be little doubt that plaintiff could now move to amend her original complaint to add Flynt as a party defendant in the *Chuckleberry* action and rely on the relation-back doctrine. Simply because she has commenced a separate action against Flynt should not preclude her from benefiting from the liberal relation-back provisions of Rule 15(c).

Fed. R. Civ. P. 15(a) provides that leave of court to amend a complaint shall be freely given when justice so requires. Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his

> defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

It is beyond dispute that the amendment here arises from the occurrence set forth in the original pleading. Flynt also received notice of the institution of the action against Chuckleberry within the one year statute of limitations. *See* Exhibit E to affid. of Jeffrey Daichman, sworn to December 24, 1981. Finally, it is apparent that Flynt knew or should have known that, but for plaintiff's misapprehension of the proper party based on the information contained in the Table of Contents of the May 1980 issue of "Adelina", that the action would have been commenced against Flynt.

CONSOLIDATION

Plaintiff moves to consolidate this action with a prior action commenced against Chuckleberry Publishers, Inc. and Publishers Distributing Corporation ("PDC") for libel, violation of the right of publicity and invasion of privacy arising from the publication of the May 1980, June 1980 and January 1981 issues of Adelina. PDC has not opposed the motion to consolidate. Flynt, however, has opposed consolidation on the grounds that consolidation at this stage of the litigation will unfairly prejudice Flynt, particularly because different factual and legal questions are presented by the two complaints. For the reasons that follow, the motion is granted.

Fed. R. Civ. P. 42(a) provides that "when actions involving a common question of law or fact are pending, . . . the court . . . may order . . . the actions consolidated . . . ." "Consolidation may be denied where no common question of law or fact is involved, where the rights of the par-

ties would not be adequately protected, where in a jury action the jury would be confused, or when consolidation would not effect any appreciable saving of time or expense." 5 *Moore's Federal Practice* §42.02 at 42-17 (2d ed. 1981).

Flynt's contention that the complaints present different factual and legal issues is meritless. Flynt and PDC both are national distributors of magazines and participated in the distribution of the controversial issues of "Adelina". Thus, it is clear that common questions of law will be presented as to the liability of a magazine distributor for libel, invasion of privacy and violation of the right of publicity. Indeed, Flynt concedes that the jury will be presented with (1) similar legal theories of recovery against Flynt and PDC; (2) similar testimony from both PDC and Flynt as to their duties and responsibilities as distributors not involved in the publication of the magazines and (3) similar testimony from both PDC and Flynt as to the workings and nature of the national magazine industry. Flynt's Memo in Opposition to Consolidation at 5. *See Lloyd v. Industrial Bio-test Laboratories, Inc.*, 454 F. Supp. 807, 812 (S.D.N.Y. 1978).

One of the primary factual disputes presented by this litigation is which distributor is liable for the distribution of the various issues since Flynt's purchase of PDC's assets on March 17, 1980 was followed by a transitional period during which both Flynt and PDC apparently participated in the distribution of "Adelina". It is clear that the issue of which of the two distributors was responsible for the distribution of the May and June 1980 issues is one that should be resolved in one lawsuit to avoid the possibility of inconsistent jury decisions.

Flynt's arguments concerning prejudice arising from possible jury confusion and "guilt by association with PDC" are unavailing. The factual issues presented in this lawsuit are fairly straightforward. It is unlikely that Flynt

would be the victim of "guilt by association with PDC." On the other hand, the goal of judicial economy will be served by consolidation in that duplication of testimony concerning the alleged defamation, plaintiff's damages and the responsibilities of magazine distributors will be avoided.

Flynt's final contention that consolidation is premature is without merit. The totality of the record in this case raises a question of fact as to which of the two publishers was responsible for distributing the May and June 1980 issues of "Adelina." To await the outcome of further discovery before ordering consolidation would serve no useful purpose. *See Lloyd v. Industrial Bio-test Laboratories, Inc.*, 454 F. Supp. 807, 812 (S.D.N.Y. 1978). Accordingly, the motion to consolidate the two actions is granted.

SUMMARY JUDGMENT

Flynt has moved for partial summary judgment pursuant to Fed. R. Civ. P. 56 on plaintiff's claims for invasion for privacy under N.Y. Civ. Rights Law §§ 50-51 (McKinney Supp. 1981-1982) and the right of publicity arising from the use of plaintiff's name in advertisements in the June 1980 and January 1981 issues of "Adelina". Plaintiff has cross-moved for summary judgment on these claims.

The advertisements appear at page 99 of the 120 page June 1980 issue and page 98 of the 114 page January issue of "Adelina". They are composed of the reproduction of four covers of back issues of "Adelina" reduced from their original size to 2-7/8ths x 3-13/16ths inches, along with a mail order form for prospective subscribers. The cover of the May 1980 issue of "Adelina" containing the words "In the Nude From the Playmen Archives . . .

Jackie Collins," in type 1/16th of an inch high is displayed in the lower left hand corner of both pages.

Flynt contends that the solitary or infrequent use of an individual's name in the context of a total work is exempt from the purview of sections 50 and 51. It also contends that the use of plaintiff's name is protected by the exemption accorded to the incidental advertisement of the news medium.

Under New York law, the use of a name or likeness incidental to the dissemination of news or "from 'incidental advertising' of the news medium in which [the plaintiff] was properly and fairly presented" is not violate of the right of publicity or the right of privacy. *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 533, 363, N.Y.S.2d 276, 278 (Sup. Ct. N.Y. County), *aff'd*, 48 App. Div. 2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975), *aff'd* 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976). As stated in *Booth v. Curtis Publishing, Co.*, 15 App. Div. 2d 343, 350, 223 N.Y.S.2d 737, 744 (1st Dep't), *aff'd*, 11 N.Y. 2d 907, 182 N.E.2d 812, 228, N.Y.S.2d 468 (1962):

> so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated albeit the reproduction appeared . . . for purposes of advertising the periodical.

The requirement of proper portrayal in the first instance has been repeatedly specified in the case law. For example, in *Sidis v. F.R. Publishing Corp.*, 113 F.2d 806, 810 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), the court stated:

> the newspaper advertisement announcing the August 14 article . . . was undoubtedly inserted in the World-Telegram 'for advertising purposes.' But since it was to advertise the article on Sidis, and the article itself was unobjectionable, the advertisement shares the privilege enjoyed by the article."

See Friedan v. Friedan, 414 F. Supp. 77, 79 (S.D.N.Y. 1977).

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See Friedan v. Friedan, 414 F. Supp. 77, 79 (S.D.N.Y. 1977).

The advertisements at issue in this case would appear to fit squarely within the exception for advertising incidental to the news medium except that plaintiff was not properly and fairly presented in the May 1980 issue of "Adelina." In this case, it is clear that the May 1980 issue of "Adelina" incorrectly identified the plaintiff as one of the

starlets appearing in the "Archives" section of the magazine and incorrectly attributed authorship of the novel *The World is Full of Married Men* to the late Jacqueline Susann, rather than plaintiff. *See Lerman v. Chuckleberry Publishing, Inc.,* 496 F. Supp. 1105, 1107 (S.D.N.Y. 1980). Thus, Flynt may not rely on the defense of use incidental to advertisement of the news medium.

The next basis upon which Flynt seeks summary judgment is that the advertisements contained in the June 1980 and January 1981 issues of "Adelina" are protected under the doctrine of incidental use. Under that doctrine, the "incidental, monetary, and isolated use" of an individual's name when "viewed in the context of the main purpose and subject" of the work as a whole is not actionable under §§ 50 and 51 of the Civil Rights Law. *Ladany v. William Morrow and Co.,* 465 F. Supp. 870, 880-82 (S.D.N.Y. 1978). This doctrine has been applied to preclude recovery to individuals mentioned or portrayed incidentally in novels or motion pictures even if the use is unauthorized or fictionalized. *See id.* Thus, in *Meeropol v. Nizer,* 381 F. Supp. 29, 38 (S.D.N.Y. 1974), *aff'd on other grounds,* 560 F.2d 1061 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978), the court found:

> Plaintiff's are not entitled to recover for an invasion of privacy because references to them as the Rosenburg children are highly incidental to the main purpose and subject of the book. Twenty-nine isolated references of a fleeting and peripheral nature are insufficient to support a claim under § 51.

Flynt contends that the various sections of a magazine are analogous to the subplots and digressions found in films, novels and plays and that the advertisement

therefore is incidental to the magazine as a whole. It further contends that the size of plaintiff's name as it appears in the advertisements coupled with the obscure position of the name in the lower left hand corner of the pages clearly establishes its incidental relationship to the subscription solicitation as a whole.

Neither of these contentions is persuasive. A magazine as a whole cannot be analogized to works such as novels or films for its many sections lack the integration of a novel, film or play which can only be understood in the context of the whole. Indeed, it is difficult to analyze a magazine in terms of its main purpose or subject except by analysis of a general theme such as news, literary, pornography, entertainment or sports. Analysis in terms of such a general theme clearly is not what is contemplated by the *Ladany* line of cases.

Flynt's argument that the minute size of the print and the obscure placement of plaintiff's name in the advertisements renders the use incidental to the subscription solicitation as a whole also is frivolous. There can be no doubt that the covers of prior issues of "Adelina" were utilized in the subscription solicitation to demonstrate the content and quality of "Adelina." Each cover included in the advertisement was designed to play a significant role in arousing the interest of the reader in "Adelina" magazine. While reduced in size, the covers were plainly visible and comprised an integral part of the advertisement and the print certainly was legible. Accordingly, the use of the cover of the May 1980 issue of "Adelina" in the subscription solicitation was not incidental to the solicitation as a whole.

For the foregoing reasons, Flynt's motion for summary judgment is denied.

Plaintiff has cross-moved for summary judgment against Flynt on her claims for invasion of privacy and

violation of her right of publicity based on the publication of the advertisements in the June 1980 and January 1981 issues of "Adelina". For the reasons that follow, the motion is granted.

As discussed in *Lerman v. Chuckleberry Publishing Inc.*, 496 F. Supp. 1105 (S.D.N.Y. 1980), the elements of a cause of action for invasion of privacy under the N.Y. Civ. Rights L § 51 are (1) that the defendant used plaintiff's name, portrait or picture within the state, (2) for purposes of advertising or trade, and (3) without first obtaining plaintiff's written consent.

There is no dispute as to the following material facts. Defendant used plaintiff's name within the state when it distributed copies of the June 1980 and January 1981 issues of "Adelina" throughout the United States, including New York. The purpose of including the cover of the May 1980 issue of "Adelina" which contained plaintiff's name in the subscription solicitation was advertising or the promotion of trade. Plaintiff did not give her oral or written consent to the use of her name. *See Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. at 1108-09. As discussed above, defendant may not rely on the defense of incidental use. Accordingly, there being no issues of material fact in dispute, *see* Lerman and Flynt's Statements pursuant to Civil Rule 3(g), and each element of the cause of action having been established, judgment is granted for plaintiff as a matter of law on her claim for invasion of privacy.

This circuit has long interpreted New York law to recognize a common law right of publicity. The elements of a cause of action for violation of an individual's common law right of publicity are: (1) that his name or likeness has publicity value; (2) that he has exploited his name or likeness in a way that evidences his recognition of its extrinsic commercial value; and (3) that defendant has

appropriated this right of publicity, without consent, for advertising purposes or for the purposes of trade. *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981).

Recently, one New York appellate court has opined that the right of publicity is not derived from the common law but "is subsumed in sections 50 and 51 of the Civil Rights Law." *Brinkley v. Casablancas*, 80 App. Div. 2d 428, 438 N.Y.S.2d 1004, 1012 (1st Dep't 1981). To establish a claim under §§ 50 and 51 for violation of the right of publicity, three elements must be established: (1) the use of a person's name or photograph; (2) for a commercial purpose; and (3) the failure to procure the person's written consent for such use. *Id.*

Under either the common law or the statutory standard, plaintiff is entitled to summary judgment on her claim for violation of the right of publicity. If the standard set forth in *Brinkley* is utilized, plaintiff must prevail for the same reasons she prevailed on her claim for invasion of privacy for the elements of the causes of action are the same.

If the common law standard which has evolved from the case law is employed, plaintiff also is entitled to summary judgment. That plaintiff's name has publicity value and that she has exploited her name in a manner which evinces her recognition of its value was determined as a matter of law in my decision in *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981). The final element, that defendant used plaintiff's name, without consent, for purposes of trade or advertising was determined in the discussion, *supra*, of plaintiff's motion for summary judgement on her claim for violation of her right of privacy. Thus, plaintiff has established that she is entitled to judgment as a matter of law under either the common law or statutory approach to the right of publicity.

CONCLUSION

In accordance with the above, in *Lerman v. Flynt Distributing Co.*, No. 81 Civ. 2281, Flynt's motion for partial summary judgment is denied. Plaintiff's cross-motion for partial summary judgment is granted as to the issue of Flynt's liability on her claims for violation of her rights of privacy and publicity.

In addition, plaintiff's motion to consolidate *Lerman v. Flynt Distributing Co.*, No. 81 Civ. 2281 with *Lerman v. Chuckleberry Publishing, Inc.*, No. 80 Civ. 1658 is granted. Plaintiff's motion to amend her complaint in *Lerman v. Chuckleberry Publishing, Inc.*, No. 80 Civ. 1658 also is granted.

So ordered.

Dated: New York, New York
June 3, 1982

HENRY F. WERKER
U.S.D.J.

Appearances:

Attorneys for Plaintiff, Grutman Schafrann & Miller, 505 Park Avenue, New York, New York 10022 by: Jeffrey H. Daichman of counsel.

Attorneys for Flynt, Zane & Teitler, One Rockefeller Plaza, New York, New York 10020 by: Edward S. Rudofsky, Frederick A. Polatsek of counsel.

Constitutional and Statutory Provisions.

Constitution of the United States

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

AMENDMENT IV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life

or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

New York Civil Rights Law

§ 50 Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51 Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such per-

son, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

May 1980 Issue of Adelina.

BEST AVAILABLE COPY

JACKIE COLLINS

Jackie is the kid sister of Joan Collins, who graced the pages of ADELINA's Archives in our first issue. Jackie is a newcomer to films and her first was *The World Is Full of Married Men*, from the novel by the late Jacqueline Susann. There is an orgy scene—two men, three women. And after that, what can a starlet do for an encore?

JANE BIRKIN

Discovered by filmmaker Michelangelo Antonioni and featured in his much-acclaimed *Blow-up*, Jane has starred in a number of unusual roles in offbeat films. In one, which was inspired by a hit song written by her husband —and recorded by Jane—she plays a servant girl who becomes sexually involved with two homosexual truckdrivers. They are interested only in having anal sex with the girl, which is all right with her. She succeeds in breaking up the male couple.

In *Don Giovanni '973*, a Roger Vadim film which also starred Brigitte Bardot, Jane played a "Don Juan in skirts," a woman who compulsively seduces not only men but other women.

Her most recent film, directed by Peter Kassowitz, has the untranslatable title: *Au bout du bout du bout*.

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Plaintiff's Exhibit 6

KATZ, LEAVY, ROSENSWEIG & SINDLE

ATTORNEYS AT LAW

1211 Avenue of the Americas
New York, N.Y. 10036

(212) 730-0808

April 11, 1980

Mark Fishman, Esq.
Larry Flynt Publications
2029 Century Park East
Los Angeles, California 90067

Re: Jackie Collins Lerman
v.
Chuckleberry Publishers, Inc. and
Publishers Distributing Corporation -
80 Civ. 1658 (HFW)

Dear Mr. Fishman:

Consistent with and further to our office's and PDC's conversations with Michael Parnes, Esq., Mr. Jay Kohls and Mr. Jim Gustafson, I am writing to give you the details concerning the above captioned matter.

Chuckleberry Publishing, Inc. ("CPI") and Publishers Distributing Corporation ("PDC") entered into a distribution agreement pursuant to which PDC distributes the magazine "Adelina".

On March 24, 1980 this office, on behalf of PDC, was served with an Order to Show Cause, Summons and Com-

plaint by the attorneys for Jackie Collins Lerman ("Lerman"). Said papers sought a preliminary injunction enjoining the above referenced defendants from publishing, advertising, printing and distributing the May 1980 issue of "Adelina" (the "Magazine"). Said Magazine had a suggested on sale date of March 25, 1980.

On March 31, 1980 a hearing in connection with Lerman's preliminary injunction application was conducted in the United States Courthouse before Judge Henry F. Werker. After entertaining oral argument, Judge Werker granted Lerman's application and preliminarily enjoined the defendants from printing, publishing, advertising and distributing the Magazine. At the conclusion of the hearing Judge Werker requested Lerman's counsel to submit an order based on the Judge's decision.

Defendants were not served with an order until April 3, 1980; and defendants did not receive a copy of the transcript of the oral decision of Judge Werker until April 2, 1980. Thus, it was not until late in the afternoon of Wednesday, April 2nd, that defendants could comply with the Judge's direction.

Upon receipt of the order on April 3, 1980, defendants filed a Notice of Appeal, Pre-Argument Statement and Notice of Motion to the Second Circuit Court of Appeals requesting a stay of Judge Werker's Order and seeking an appeal of the Court's decision.

On April 8, 1980 the Second Circuit, United States Court of Appeals, entertained oral argument with regard to the request for a stay and summarily denied the request. Likewise on April 8, 1980, as a result of plaintiff's counsel's motion to hold the defendants in contempt for an alleged failure to comply with the Court's Order of April 3, the Court entertained oral argument at the United States Courthouse. As a result of said hearing Judge Werker denied the contempt motion and directed the

defendants to issue a third telegram to wholesalers directing the wholesalers to withdraw the Magazine from the market place. (A first telegram was sent out to wholesalers on March 26th advising them of the pendency of the lawsuit and a second telegram was forwarded to the wholesalers on April 2nd advising of Judge Werker's decision to grant the preliminary injunction motion.)

The Distribution Agreement between PDC and CPI contains an indemnification of PDC by CPI, with regard to all claims such as those involved in the instant matter. For your information and edification, Lerman has instituted suit on the basis of alleged invasion of privacy, alleged violation of the right of publicity, alleged libel and a violation of Sections 50 and 51 of the New York Civil Rights Law.

The above facts are merely illustrative and recite the proceedings involved in this matter to date. In view of the fact Flynt Distributing Company, Inc. ("Flynt") finalized its acquisition of certain assets of PDC on March 17, 1980, it would seem that Flynt should properly shoulder the responsibility with regard to said Magazine and the above action. I would appreciate your thinking in this regard. In the interim we are, of course, continuing to defend this matter and stand ready to aid you in the defense of same.

If you should have any questions at all in connection with this matter, please do not hesitate to call me.

Sincerely,
STEPHEN R. STERN

SRS:FMN

(3)

Office-Supreme Court, U.S.
FILED
APR 1 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1359

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JACKIE COLLINS LERMAN,

Petitioner,

v.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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James B. Zane,
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Of Counsel.

March 27, 1985

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I. The Court of Appeals did *not* "ignore the teaching of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)," as claimed by petitioner. To the contrary, the Court of Appeals expressly recognized the "limited First Amendment protection afforded [to commercial appropriations] under *Zacchini*" but, after carefully analyzing petitioner's complaint and proof, correctly concluded that "*Lerman's action presents a classic false light claim*" (emphasis added) subject to the requirement that she prove actual malice in accordance with *Time, Inc. v. Hill*, 385 U.S. 374 (1967)..... 8

II. The categorization of Collins as a "limited purpose public figure" by the Court of Appeals, with respect to the on-going public debate over "the propriety of female or male nudity in films and in the print media generally," is completely consistent and does not conflict with *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Readers' Digest Ass'n*, 443 U.S. 157 (1979)..... 11

III. The Court of Appeals did *not* "ignor[e] the reckless disregard branch" of the *New York Times v. Sullivan* definition of "actual malice", but rather carefully evaluated petitioner's scant "proof" of such alleged reckless disregard and correctly concluded that there was a complete failure of proof. *Bose Corp. v. Consumers Union of United States*, ____ U.S. ____, 104 S.Ct. 1949 (1984)..... 13

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IV. As petitioner clearly failed to meet the New York "gross irresponsibility" standard for Civil Rights Law §§ 50, 51 liability to private parties enuciated in *Chapadeau v. Utica Observer-Disptach, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975), and as petitioner's claim for compensatory damages is, in any event, now barred by the $100,000 settlement she accepted and was paid by PDC, there are clearly independent and adequate grounds under New York law requiring dismissal of petitioner's Complaint; hence, certiorari would be improvident and the petition should be denied. *Zacchini, supra*, 433 U.S. at 566; *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958); *Herb v. Pitcairn*, 324 U.S. 117 (1945). 17

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 85-1359

JACKIE COLLINS LERMAN,

Petitioner,

v.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

This memorandum is respectfully submitted on behalf of respondent Flynt Distributing Company, Inc. in opposition to the petition of Jackie Collins Lerman for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

COUNTER-STATEMENT OF THE CASE

Petitioner Lerman, internationally renowned as "Jackie Collins" ("Collins"), the best-selling authoress of sexually explicit novels and film screenplays, and an outspoken advo-

cate of sexual equality in the film arts ("Equal Nudes For All"), seeks review of the judgment of the Court of Appeals dismissing her action against respondent for invasion of privacy under New York Civil Rights Law §§ 50 and 51, arising out of the misdescription of Collins as an actress appearing nude in, rather than as authoress of, the film "*The World is Full of Married Men*" ("*Married Men*").

Petitioner is a "celebrity-author" whose *nom de plume* and picture have appeared on more than 9 million copies of her (8) best-selling books, which have been published in 32 countries throughout the world.[1] As an actress, she has appeared in 3 plays, 40 to 60 television shows and 30 films. As an authoress and advocate for sexual equality, she has given "hundreds" of interviews to the media, *inter alia*, espousing her "personal philosophy" on nudity and "the double standard in this country" (i.e., the United States). A partial compilation of the press materials distributed by and with respect to petitioner, and many articles about her which have appeared in the *celebrity* and *gossip* column sections of American newspapers and magazines is reproduced in respondent's appendix, *infra*, at RA 1-2.

One such interview appeared in *Penthouse* magazine, another in *Swank*; both of these "men's" magazines feature nude females in various poses. Petitioner had no objection to being publicized in *Penthouse* (or *Swank*), but objects to the *reference* to Collins in *Adelina* because of the false light in which she is portrayed.

In 1968, Collins authored the book *Married Men* and she subsequently wrote the screenplay for the film, which was produced by her husband, Oscar Lerman. In August, 1979, the Italian magazine, *Playmen*, originally published the article

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1 In the year prior to the trial, Lerman "was the third highest selling novelist in the United States" as a consequence of the extraordinary success of *Chances*, the novel she was in the midst of writing when the publications complained of occurred.

complained of, a serious essay on the emerging freedom on actresses to appear in the nude in American films. Petitioner omits the text of the article from her appendix; respondent has accordingly reproduced the text in its appendix, *infra*, at RA 3-4. The essay was accompanied by captioned photographs of several actresses, and included outtakes from the set of *Married Men* featuring a simulated orgy scene and a photograph of an actress nude from the waist up. The caption accompanying these two photographs misidentifies the author of *Married Men* as Jacqueline Susann and "Jackie Collins" as the otherwise unidentified actress whose picture is shown. Petitioner never complained to *Playmen* or took legal action against it on account of the misdescription of "Jackie Collins", nor did she attempt to prove in this case how or why the original error was made.[2]

The *Playmen* article was republished in the United States in the May 1980 issue of *Adelina* magazine, which repeated *Playmen's* misidentification of Collins.[3] Although petitioner received an advance copy of the magazine in February, 1980, and was aware of the misidentification of Collins, she did not contact either *Adelina's* publisher, Chuckleberry Publishing, Inc. ("Chuckleberry"), or its national distributor, Publishers Distributing Company, Inc. ("PDC"), and took no action whatsoever for several weeks, apparently deliberately delaying until the last day prior to the March 25, 1980 "on-sale" date of the magazine, when she commenced an action against Chuckle-

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2 The District Court summarized the publisher's explanation for the error in its July 31, 1980 Opinion (38a, at 40a), as follows:

> Chuckleberry's Italian licensor purportedly obtained the photographs and text in precisely the form in which they appear in *Adelina* from the Luxembourg office of Media Press International ("MPI"), a public relations firm. *The material allegedly was received and distributed by MPI in connection with the promotion of the film The World Is Full of Married Men.* [Emphasis Added.]

3 *Adelina* is the "English language version of *Playmen*." *See, Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563, 564-65 (2d Cir. 1982).

berry and PDC, obtaining a preliminary injunction against further sale or distribution of the magazine.

By written agreement dated March 17, 1980, respondent purchased PDC's *magazine distribution business*, with financial adjustments retroactive to February 29, 1980, but with PDC contractually obligated to continue to operate the business until at least April 11, 1980. In fact, PDC continued to operate the business until August, 1980, when its New York office was closed and functions transferred to respondent's California office. *Consistent with the standards of the magazine industry*, neither PDC nor FDC had any advance knowledge or control over the content of any issue of *Adelina* and their publication dissemination function *as national distributor* was limited to supplying the publisher's printer with a computerized list of magazine wholesalers to which the magazines were to be shipped—a function performed independently and well in advance of the printing and physical distribution of the magazines. In short, respondent, like any *national distributor*, at no time in this litigation had any advance knowledge of the content of any of the issues sued upon (including the publisher's subscription solicitation page), let alone knowledge of the use of the name "Jackie Collins".

PDC fully complied with the preliminary injunction, including transmitting telegrams to its more than 500 nationwide wholesale customers in accordance with explicit instructions of the District Judge, informing its wholesalers of petitioner's suit and the preliminary injunction, and requesting that all unsold copies of the disputed magazine be returned. Ultimately, over 84% of the magazines were in fact returned.

The cover of the May 1980 issue of *Adelina*, which mistakenly referred to Collins "in the nude", was reduced to 1/8th its original size and reprinted by Chuckleberry in the June 1980 and January 1981 issues of *Adelina* as part of the publisher's subscription solicitation page contained in each issue.[4] Copies of these advertisements are reproduced *infra*, at

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4 The national distributor has *no* financial interest whatsoever in the publisher's subscription solicitation or any revenue thereby derived by the publisher.

RA 5-6. Collins' name, reduced proportionately in size, is "miniscule" and difficult to read at best. Collins made no effort to prove at trial how or why the May cover appeared in the publisher's June or January subscription advertisements, and the record clearly establishes (i) that the national distributor (PDC) would have furnished the publisher's printer with the galley (i.e., list) of wholesalers for the June 1980 issue by the first week of March, 1980 [i.e., approximately two (2) weeks prior even to respondent's March 17, 1980 purchase of PDC's business] and (ii) that the content for the June issue (with respect to which respondent had no knowledge or control) would have already been at the printer substantially prior to March 24, 1980 (when Collins commenced her action against distribution of the May issue), *for shipment of the June 1980 issue began on that date.*

Prior to trial, (i) Chuckleberry filed for reorganization under Chapter XI of the bankruptcy law and petitioner's complaint against it was stayed, (ii) petitioner settled with and was paid $100,000 by PDC, more than adequately compensating her for her alleged damages, which she grossly failed to prove at trial, and (iii) the District Court granted partial summary judgment for petitioner on her invasion of privacy claims, in effect stripping respondent—one of seven *national magazine distributors* and a classic "*media defendant*"—of First Amendment protection against petitioner's New York statutory claims.

At trial, petitioner abjectly failed to prove either (i) the substantial damages alleged by her, (ii) any knowledge, control, responsibility or involvement whatsoever by respondent (or its predecessor, PDC) in the selection of the content of any of the three magazines in issue, or (iii) malice against Collins in any form whatsoever. Moreover, on cross-examination petitioner repeated her pre-trial "public figure" admissions, conceding that she is an accomplished actress, as well as an authoress; had voluntarily given as many as 500 published interviews prior to the trial; had, in addition, appeared on numerous television and radio shows, and espoused in interviews, as well as her writing, her "personal philosophy" regarding the "double standard" and her concept of "equal nudes for all."

Recognizing respondent's total lack of involvement, the District Court refused to submit Collins' claim for punitive damages with respect to the May 1980 issue of *Adelina* to the jury "since FDC had no knowledge that plaintiff's name or picture would appear in the May 1980 issue," however, it did charge as to punitive damages with respect to the June 1980 and January 1981 issues, which were allegedly distributed after the commencement of Lerman's action.[5]

Notably, although petitioner now claims that she "did not pursue discovery and proof of 'actual malice' " [Petition, at 20], she in fact (i) engaged in substantial pre-trial discovery, (ii) requested a malice charge to the jury (reproduced, *infra*, at RA 7) and (iii) her counsel devoted a substantial portion of his summation to pursuading the jury that FDC's principal (who played no role in the facts of the case and whose name was obviously mentioned soley to inflame the passion and prejudice of the jury) had acted maliciously in failing to take steps to prevent the republication of petitioner's name in the June and January issues of *Adelina*. As found by the Court of Appeals, however, there was "simply no evidence—which plaintiff had every incentive to develop to obtain punitive damages—that any Flynt Distributing employee was aware that the publisher's errors would reoccur." (33a)

Obviously prejudiced in the extreme by petitioner's counsel's summation—a virtual replay of his grossly improper summa-

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5 As previously explained, the national distribution function for the June 1980 issue of *Adelina*—furnishing of the list of wholesalers to the printer—was complete some three (3) weeks before Lerman commenced her action. In the case of the January 1981 issue, petitioner completely failed to demonstrate that there was any reason for respondent's employees to anticipate the republication of the subscription solicitation page, especially since petitioner did not bring the June 1980 issue to any party's attention until March 1981, nearly six (6) months after respondent had completed its dissemination function with respect to that issue and approximately five (5) months after the January issue went on sale in November, 1980. Respondent, therefore, was completely unaware of, and had no reason to suspect or anticipate, the inclusion of the May 1980 cover in the June 1980 subscription solicitation, and had absolutely no reason to suspect or anticipate that the same subscription solicitation (which was not utilized by the publisher at any other time) would be republished in the January 1981 issue.

tion in *Guccione v. Hustler Magazines, Inc., et al.*, 7 Med. L. Rept. 2077 (Ohio Ct. App. 1981), *cert. denied*, 459 U.S. 826 (1982)—the jury returned its verdict, awarding petitioner $800,000 in compensatory damages with respect to the May 1980 *Adelina*, $1.2 million in compensatory and $1 million in punitive damages with respect to the June issue, and $5 million in compensatory and $32 million in punitive damages on account of the January 1981 issue, a total of $40 million.

Following remittitur of the judgment to $10 million (by reduction of the $32 million in punitive damages with respect to the January 1981 issue to $2 million), respondent (joined by the International Periodical Distributors Association, Inc., the American Booksellers Association, Inc., the National Association of College Stores, and the Periodical And Book Association of America, Inc., as *amici curiae*) appealed to the Court of Appeals for the Second Circuit, which unanimously *reversed* the judgment in a lengthy, detailed and scholarly opinion by Circuit Judge Cardamone. Petitioner's motion for rehearing in banc was denied and her petition for certiorari belatedly ensued.

Significantly, in light of petitioner's present plea for a new trial, her motion for rehearing in banc—filed after the Court of Appeals panel majority had ordered her complaint dismissed—failed to point to any additional evidence of actual malice which petitioner hoped to adduce, although petitioner at that point had every incentive to reveal any conceivable evidence or theory in this regard in order to obtain in banc relief.

Indeed, there is no evidence—clear and convincing, or otherwise—which petitioner could introduce which would show actual malice, since the evidence is uncontroverted that respondent had no prior knowledge of the contents sued upon, let alone knowledge of the misidentification of Collins at the time respondent (or PDC) merely performed the *national distribution function* for each issue of the magazine in question—i.e., at the time it transmitted the list of wholesalers to the publisher's printer. There is thus no basis upon which even a properly instructed jury could reasonably hold respondent liable to petitioner.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals did *not* "ignore the teaching of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)," as claimed by petitioner. [Petition, at 8] To the contrary, the Court of Appeals expressly recognized the "limited First Amendment protection afforded [to commercial appropriations] under *Zacchini*" but, after carefully analyzing petitioner's complaint and proof, correctly concluded that "*Lerman's action presents a classic false light claim*" (emphasis added) subject to the requirement that she prove actual malice in accordance with *Time, Inc. v. Hill*, 385 U.S. 374 (1967). (20a)

There is simply no factual or analytic relationship between *Zacchini*, in which a famous circus performer sought to protect his property interest in his performance [an interest which the Court characterized as "focusing on the right of the individual to reap the rewards of his endeavors and having little to do with protecting feelings or reputation" (433 U.S. at 573)] and *Lerman*, in which petitioner vigorously claimed she is a private person, has never appeared nude publicly, and was defamed by the article complained of, allegedly suffering mental distress and humiliation. The gravamen of petitioner's complaint was clearly that she was portrayed in a false light—i.e., as a nude actress rather than as the authoress of the screenplay for the film in which the nude actress appears—and she failed even to "establish a *prima facie* cause of action for violation of her right to publicity." (19a)

Petitioner is thus clearly incorrect in her assertion that "the commercial exploitation here is far closer to *Zacchini* than to *Hill*." *Compare*, Restatement (Second) of Torts, § 652C ("Appropriation of Name or Likeness") *with* § 652E ("Publicity Placing Person in False Light"). *See, generally*, W. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

Likewise fallacious is petitioner's totally unsupported claim that "this case cries out for definition and guidance from this Court so that lower courts do not continue to apply the doctrine of *Time, Inc. v. Hill* in such an expansive manner as to undermine the individual's right to be free from commercial exploitation." [Petition, at 13]

Petitioner refers to *no* lower court decision which has misapplied the teaching of *Time, Inc. v. Hill, supra*, in such a manner, nor can she support her theorem that the mere misdescription of her in and on the cover of a magazine offered for sale to the public *ipso facto* constitutes a "commercial appropriation", for if this were the standard, there would be *no* inaccurate use of any person's name by the commercial print media which would remain protected under *Time, Inc. v. Hill*. Here, moreover, the facts plainly establish that there was *no* "commercial appropriation" of petitioner's pseudonym and, to the contrary, there was merely editorial error by the original publisher (perhaps even originating with the publicist for petitioner's movie; see n. 2, *supra*), repeated by Chuckleberry, which resulted in Collins' relationship with *Married Men* being mischaracterized and petitioner thereby portrayed in a "false light"—as nude and participating in a simulated movie orgy, rather than as the authoress of the screenplay featuring such nudity and simulated sex—from which all of petitioner's complaints flow.

Moreover, the New York courts have uniformly rejected petitioner's argument in construing and applying Civil Rights Law §§ 50 and 51, under which Collins' claims arise, in light of both the New York State and Federal constitutional guarantees of free speech and press. *See, Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440-442, 449 N.Y.S.2d 941, 944-45 (1982) (. . . "[The] narrow reading of the statutory provisions [§§ 50 and 51] has not been without sensitivity to the potentially competing nature of the values the Legislature, on the one hand, served by protecting against the invasion of privacy for purposes of "advertising" or "trade" and, on the other, the

values our State and Federal Constitutions bespeak in the area of free speech and free press. * * * . . . [O]ther than in the purely commercial setting covered by Sections 50 and 51, an inability to vindicate a personal predilection for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely.") *Accord, Davis v. High Soc. Magazine, Inc.*, 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dept. 1982), *appeal dismissed*, 58 N.Y.2d 1115 (1983).

Finally, we note that while petitioner principally relies upon *Zacchini* in her last-ditch effort to avoid dismissal of her case, this is a position she has vaulted to prominence only belatedly in an attempt to pique the interest of this Court. In her Court of Appeals brief, *Zacchini* was mentioned but *once, in passing* [". . . and the Supreme Court has recognized that commercial appropriation enjoys no special First Amendment privilege. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)."] and *not at all* in her petition for rehearing in banc, in which petitioner argued that the Court of Appeals had misapplied the "relationship" test of *Arrington, supra*, but conspicuously failed to make any argument predicated on what she now characterizes as "ignor[ing] the teaching of *Zacchini*."

Indeed, the transcript of the argument in the Court of Appeals reveals that in discussing the eleven (11) different cases relied upon and/or distinguished by petitioner's counsel during oral argument, there was *not one reference to Zacchini*. Especially telling in this regard was counsel's response to Judge Cardamone's pointed inquiry: "How do you distinguish this case from the rationale of *Time v. Hill*?" Unable to do so, counsel did *not* distinguish *Time, Inc.* by reliance on—or even mention of—*Zacchini*, but instead launched into a complex and obviously prepared "illustration", citing and comparing *Arrington, Time, Inc. v. Hill, Davis* and a pre-*New York Times v. Sullivan* case, *Thompson v. Close-Up*. The full colloquy is reprinted *infra*, at RA 8. Again, however, *conspicuously absent from counsel's presentation was any reference to or reliance upon Zacchini*, only now, disingenuously claimed to be not only relevant but controlling.

II.

The categorization of Collins as a "limited purpose public figure" by the Court of Appeals, with respect to the on-going public debate over "the propriety of female or male nudity in films and in the print media generally," is completely consistent and does not conflict with *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Readers' Digest Ass'n*, 443 U.S. 157 (1979).

The plaintiffs in each of these cases were indisputably *non-celebrities*, who—*unlike petitioner*—did not actively seek media attention in order to promote themselves and their "personal philosophy" to the public-at-large. Mrs. Firestone was simply a wealthy individual involved in a well-publicized divorce, nothing more. 424 U.S. at 453. Mr. Hutchinson, one of countless recipients of federal grant monies, likewise had virtually no "public profile" prior to the events he complained of. 443 U.S. at 134-36. Similarly, Mr. Wolston was totally unknown to the public prior to his failure to respond to a grand jury subpoena. 443 U.S. at 162-163.

There is simply no comparison between these plaintiffs and "Jackie Collins", by her own admission the third best-selling authoress in the United States, who has clearly achieved general fame and notoriety[6] through her efforts to publicize

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6 Petitioner's Complaint affirmatively pleads:

> Plaintiff is a successful writer who has written books and screenplays of international acclaim. *She is a well-known personality who attracts a great deal of public attention as reflected by her numerous radio and television appearances on popular American entertainment and news shows, and by her numerous public relations and promotional tours throughout the United States.* [Second Amended Complaint, at ¶ 19 (emphasis added)]

In a similar case, *Rand v. Hearst Corp.*, 31 A.D.2d 406, 408, 410, 298 N.Y.S.2d 405, 409, 411 (1st Dept. 1969), in which the plaintiff likewise alleged that she was "well known in the contemporary intellectual and literary world [and] among the public at large generally she possesses great fame as a writer," the court unhesitatingly concluded "*[t]hat the plaintiff is a public figure needs no discussion. Her complaint rests on that fact.*"

[*footnote continued on next page*]

not only her books and films, but *herself and her views on a wide variety of topical subjects, including especially and particularly the equal treatment of men and women in films depicting nudity and sexual activity.*

Indeed, petitioner admitted *lobbying in the media* for her views on the latter subject, which could not be more topical in the 1980's, further distinguishing this case from those relied upon by her. There is today, and was in 1980, an on-going public debate in this country concerning both "morality in media" and the role and depiction of women in society in general and in the film and entertainment industry in particular. *See, e.g.*, Wood, "She Sings Lyrics of Affirmation for Women," *The Christian Science Monitor*, September 22, 1980, p. 19:

> The road for women in the arts—despite their visible success in this field—has been at least as bumpy as their road toward equality in employment, education, and male-female relationships. But it has been a less-watched, if no less important, drama.

See, also, Hefner, "Narrowcasting' and the Threat to Morals," *The New York Times*, August 17, 1980, Section Two, p. 29 ("The new home communications industry is on a collision course with the manners and morals Americans have traditionally accepted as appropriate in their homes. When they collide, there is reason to fear a reaction destructive of freedom . . ."); Korry, "Fairfax Studies Proposal to Ban [Nude] Go-Go Dancing, "*The Washington Post*, July 3, 1980,

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[*footnote continued from preceding page*]

(Emphasis added.) *See, also, Atkins v. Friedman*, 49 A.D.2d 852, 374 N.Y.S.2d 11 (1st Dept. 1975) (author of book which sold over 4,000,000 copies is "obviously a public figure").

The New York courts have consistently held "public personalities" who have taken "affirmative steps to attract public attention" to themselves to be public figures for the purpose of Civil Rights Law §§ 50 and 51. *See, e.g., Maule v. NYM Corp.*, 54 N.Y.2d 880, 444 N.Y.S.2d 909 (1981); *James v. Gannett Co.*, 40 N.Y.2d 415, 386 N.Y.S.2d 871 (1976).

p. Va. 13; Nakahaig *The Washington Post*, September 29, 1979, p. B2 (Bridgett Bardot, commenting on nudity in films, "says things have now gone too far."); and Alan, "The Search for the White Knight," *The Washington Post*, April 24, 1979, p. B1 (refusal of actress Jennifer O'Neill to appear nude in films).

The Court of Appeals thus correctly resolved the issue of whether petitioner injected herself into a public controversy, namely, "the propriety of female or male nudity in films and in the print media generally." (26a-27a) Concluding, as the record compelled it to (*see*, RA 1-2), that Collins, "as a controversial, outspoken authoress and screenwriter advocating equal nudity, was . . . a willing participant in this public controversy" (27a), the Court of Appeals accordingly categorized her correctly as at least a "limited purpose public figure" for the purposes of the *Playmen/Adelina* commentary on the emerging freedom of serious actresses to appear nude in films produced for American audiences.[7]

III

Contrary to petitioner's misleading assertion, the Court of Appeals did *not* "ignor[e] the reckless disregard branch" of the *New York Times Co. v. Sullivan* definition of "actual malice" [Petition, at 20], but rather carefully evaluated petitioner's scant "proof" of such alleged reckless disregard and correctly concluded, (i) with respect to the May 1980 issue, that petitioner failed to offer proof sufficient even to impose a duty to inquire on respondent; that the District Court specifically found no "knowing use" under § 51; and that "*there was no proof that any of [respondent's] employees had reason to believe that Chuckleberry (the publisher) would misidentify*" *petitioner*, and (ii) with respect to the June 1980 and January

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7 The correctness of the Court of Appeals conclusion in this regard is only underscored by petitioner's *concession* "[t]hat she has voluntarily chosen to deal with the subject publicly at press conferences. . . ." [Petition, at 15]

1981 issues, "*there is no evidence in the record showing that Flynt Distributing* knew or *recklessly disregarded* whether these editions contained any mention of plaintiff, let alone any factual error concerning her." (32a; emphasis added)[8]

Petitioner nonetheless continues to argue, as she did below, that she adduced sufficient evdience of actual malice to warrant a trial and verdict in her favor. [Petition, at 18] The record belies petitioner's rhetoric, however, and overwhelmingly establishes beyond peradventure of doubt that respondent did *not* act with reckless disregard of whether petitioner was mentioned—falsely or otherwise—in any issue of *Adelina* magazine.

The entire litany of "facts" relied upon by petitioner is nothing more than a recitation of the early history of her original action against PDC and Chuckleberry—an action which *exclusively* challenged only the May 1980 issue of *Adelina*. It is, however, undisputed that respondent had no knowledge of the content of the May 1980 issue, let alone the misdescription of petitioner in it, and did not even purchase PDC's distribution business until several weeks *after* PDC had already completed the national distribution function (the furnishing of a list of wholesalers to the publisher's printer) with respect to the May issue. Moreover, petitioner did not cross-appeal from and is, therefore, now bound by the District Court's express ruling that there is no "knowing use" of petitioner's pseudonym in this issue and that respondent had no knowledge that plaintiff's name or picture would appear in the May 1980 issue. *Duignan v. United States*, 274 U.S. 195 (1927).

Contrary to petitioner's argument that there is no relationship between "knowing use" and "actual malice" [Petition, at

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8 The Court of Appeals analysis of "Actual Malice in this Case" [Section III (c)(2) of the opinion below] is reproduced out of numerical page order in petitioner's appendix, with pages 6173 and 6172 of the Court of Appeals slip opinion reproduced between pages 6170 and 6171, making this section of the opinion difficult to follow in the appendix. *Compare*, 745 F.2d at 140-141.

19-20], the New York courts have repeatedly equated the two concepts, *see*, *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 150, 454 N.Y.S.2d 971, 975 (1982) ("The jury was charged that it could award exemplary damages if it found that defendant 'used plaintiff's picture, knowing that plaintiff had not consented to the use, or in reckless disregard of whether plaintiff had consented to the use.' "); *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499-500, 410 N.Y.S.2d 282, 286 (1978) ("Hallmark was acting either with actual knowledge, or at the very least, with a reckless disregard for the truth of plaintiff's assertions", citing *Time, Inc. v. Hill*).

The artificial distinction which petitioner seeks to draw between "actual malice" and "knowing use" [Petition, at 19-20] is inapposite to a "false light" case such as *Lerman* since here, in sharp contradistinction to the "appropriation" cases relied on by petitioner, inaccuracy and misdescription are inherent in the use by the publisher. Thus, the Court of Appeals was clearly correct in its holding that evidence of "knowing use" by respondent would be identical to proof of "actual malice" and, accordingly, that petitioner's complete failure to prove the former, despite having every incentive to do so, clearly and unequivocally signaled her terminal inability to prove the latter.

It is likewise undisputed that the national distribution dissemination function was complete with respect to the June 1980 issue several weeks prior to the commencement of petitioner's action in the District Court, that respondent had no knowledge or reason to anticipate that petitioner would be referred to in these later issues, and that petitioner did not raise any questions regarding these issues until March 1981, well after the national distribution functions for even the January 1981 issue were complete.

Nor may petitioner argue, as she attempts [Petition, at 18], that respondent rests on mere "professions of good faith." Petitioner called no witnesses at trial with respect to the June 1980 and January 1981 issues (other than to prove that they were, in fact, sold and that each referred to petitioner).

Respondent, on the other hand, called as witnesses (among others), its Distribution Director, its Assistant Treasurer (formerly the Assistant Controller of PDC) and its National Circulation Director, who testified *without contradiction* that the responsible employees of respondent had no role in the distribution of the May and June 1980 issues and no personal knowledge of petitioner, let alone advance notice of the contents of the magazine in general, much less the subscription solicitation pages in particular. Furthermore, respondent's expert witness, an industry consultant, clearly established that respondent would have had no prior knowledge of the content of each issue of *Adelina*.

Petitioner called no witnesses to offset this clear testimony, but instead relies on PDC attorney Stephen Stern's April 11, 1980 letter to respondent. This letter did *not* "demand" indemnity by respondent, but, to the contrary, requested respondent's "thinking" as to which entity (i.e., respondent or PDC) was contractually obligated to defend against petitioner's complaint. *Compare* Petition, at 17-18, *with* 91a. The Stern letter is, in any event, wholly irrelevant to the decisive issue of *whether* respondent's employees "having responsibility for the [distribution] of the June 1980 and May 1981 issues had the requisite state of mind, *New York Times v. Sullivan*, 376 U.S. 254 (1963), at 287, and "entertained serious doubts" as to whether the June and January issues referred to petitioner and then, in spite of their state of mind, sent the galley of wholesalers to the publisher's printers. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In this case the evidence is *uncontroverted* that the May and June 1980 wholesaler lists had already been sent to the printer prior to the commencement of petitioner's action and no responsible employee of respondent (four of whom testified at the trial) knew or had any reason to anticipate that petitioner would be referred to in either the June 1980 or January 1981 issues of *Adelina*, or entertained any "doubt", "serious" or otherwise. Accordingly, petitioner's inclusion of the Stern letter in her appendix as her key proof of "reckless disregard" clearly signals the utter lack of merit in her contentions.

Given these undisputed and indisputable facts and circumstances, there is no question but that petitioner did not and could not prove actual malice by clear and convincing—or any—evidence and, therefore, that a properly instructed jury could not reasonably find for petitioner. For this reason, the Court of Appeals correctly reviewed and independently scrutinized the record, and thereupon dismissed petitioner's complaint. *Bose Corp. v. Consumers Union of United States*, ____ U.S. ____, 104 S.Ct. 1949 (1984).

Nor may petitioner belatedly argue in this Court, *for the first time*, that there is additional evidence, *not disclosed in her certiorari petition or to the Court of Appeals below*, which she should be permitted to pursue by way of additional discovery or introduce at a retrial. Simply put, certiorari is not a substitute for a motion for a new trial. Petitioner argued in the Court of Appeals that the record as a whole established statutory "knowing use" and constitutional "actual malice", and she maintained that posture in her petition for rehearing in banc. Her certiorari petition nevertheless inconsistently attempts to argue that she requires a new trial in order to prove her case. Her petition is silent, however, as to what further or additional evidence is to be discovered or introduced into the record, and it is abundantly clear that petitioner, in fact, has had a full and complete opportunity to make a record of respondent's alleged culpable acts and omissions, but has simply failed to prove actual malice by clear and convincing (or any other) proof.

IV

As petitioner clearly failed to meet the New York "gross irresponsibility" standard for Civil Rights Law §§ 50, 51 liability to private parties enuciated in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64, (1975), and as petitioner's claim for compensatory damages is, in any event, now barred by the $100,000 settlement she accepted and was paid by PDC, there are clearly independent and adequate grounds under New York law re-

quiring dismissal of petitioner's Complaint; hence, certiorari would be improvident and the petition should be denied. *Zacchini, supra,* 433 U.S. at 566; *Wilson v. Loew's, Inc.,* 355 U.S. 597 (1958); *Herb v. Pitcairn,* 324 U.S. 117 (1945).

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), this Court concluded that in the case of private individuals involved in a matter of general public interest, but not a particular controversy, the States should be accorded substantial latitude in fashioning a defamation remedy against media defendants based on "fault". Subsequently, the New York Court of Appeals expressly fashioned such a remedy in *Chapadeau, supra*:

> "We now hold that within the limits imposed by the Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderence of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

Assuming, *arguendo*, that petitioner is not a limited purpose public figure, as found and held by the Court of Appeals, petitioner's own view of this case brings her squarely within the *Chapadeau* rule, requiring her to have at least established, by a preponderance of the evidence, that respondent, a distributor (i.e., *not* a publisher), "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible [national distributors]."

Petitioner, however, clearly failed to meet even this alternative standard for recovery. The District Court itself concluded that respondent had no knowledge with respect to the May 1980 issue, nor any reason to know of the content of that issue,

let alone of the reference to petitioner, an obvious conclusion supported by the fact that petitioner did not even purchase PDC's distribution business until mid-March, 1980, well after PDC had already completed the national distribution function for the May issue. Moreover, in accordance with industry standards, PDC had no knowledge of the content of the May issue, nor could it be expected to have such knowledge.

The same analysis clearly applies to the June 1980 issue, which was shipped by Chuckleberry's printer on March 24, 1980, the same day Lerman commenced her action with respect to the May issue. Again, the national distribution function—the furnishing of the wholesaler list to the printer—was complete well before both respondent's purchase of PDC's business and the commencement of petitioner's action, and neither petitioner nor PDC acted inconsistently with industry standards, let alone "in a grossly irresponsible manner"—the *Chapadeau* standard.

Similarly, petitioner utterly failed to prove any departure from industry standards, and certainly not gross irresponsibility, with respect to the January 1981 issue. Respondent's expert testified unequivocally at trial that the national distributor is not customarily provided with a copy of the magazine prior to shipment, and petitioner neither cross-examined respondent's expert with respect to this testimony nor introduced any evidence of her own as to "the standards of information gathering and dissemination ordinarily followed by responsible parties" which she claims were not observed in this case, relying instead on her theory of the case to the effect that once respondent was aware of petitioner's complaint with respect to the May 1980 issue, it was "on notice" to police all future issues of *Adelina* magazine for incidental references to petitioner. Petitioner, however, had never heretofore, and does not presently support this *ipse dixit,* which is contrary to the evidence and was correctly rejected by the Court of Appeals.

Moreover, respondent is a *merchandiser, not* a "publisher." To impose liability on respondent, which has no control over

or advance notice of content, "would subject such merchandiser to hazards over which it has no control, and impose upon it a burden disproportionate to the interest to be protected." *Brinkley v. Casablancas,* 80 A.D.2d 428, 444, 438 N.Y.S.2d 1004, 1014 (1st Dept. 1981) (construing and applying New York Civil Rights Law §§ 50 and 51).

Furthermore, New York has and continues to narrowly construe and to engraft exceptions onto Civil Rights Law §§ 50, 51 in order to protect the liberty of speech and press under the New York Constitution, Article 1, § 8, as a matter of New York public policy, *not* federal constitutional law.[9] *See, Arrington, supra* (explicit reference to State constitutional values) and *Rand v. Hearst Corp, supra*, 31 A.D. 2d at 408, 298 N.Y.S. 2d at 409:

> The history and purposes of sections 50 and 51 of the Civil Rights Law have been the subject of much discussion . . . It is sufficient for our purposes to say that the sections and the law were designed to protect an individual against 'selfish, commercial exploitation' . . ..
>
> The law—narrowly written—attempts to do so by proscribing the use of the person's name or picture for the purpose of trade or advertising. However, it has already been clearly established that no in every instance where a person's picture or name is used . . . will a violation of the statute be found. . . .
>
> Thus, in construing the law, the courts have looked to its underlying purpose . . . the protection of an individual's right of privacy. *They [i.e., the words 'advertising purposes' and 'purposes of trade'] must be construed narrowly and not used to curtail the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment*

9 Broader than the Federal Constitution, the New York free press clause (RA-10) expressly requires "abuse" of the right to publish freely as a constitutional threshhold requirement to the imposition of liability. Simply put, there was no such "abuse" in this case.

on matters in which the public has an interest or the right to be informed . . .. As stated by the Court of Appeals in *Spahn*, and quoted with approval by the United States Supreme Court in *Time, Inc. v. Hill* . . . 'ever mindful that the written word or picture is involved, *courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.*' . . .

It is quite apparent, therefore, that books and publications have a special position in the law. . . . *'[P]ublishing, though a business*, stands on a somewhat different plan than many other businesses in that freedom of the press is often involved.' Therefore, in considering books and publications, courts must take a broad view of what may or may not be written and what may or may not be said about books and their authors.

The right to publish factual matter of interest to the public was recently considered in the case of *Time, Inc. v Hill* (*supra*), where the United States Supreme Court held that there was no action under the New York privacy statute in the absence of proof that the matter was published with knowledge of its falsity, or with reckless disregard of the truth. Hence, the courts have been careful to interpret the right of privacy statutes in such manner as would permit the free flow of information. . . .

Consequently, it is not sufficient to show merely, as plaintiff does here, that the acts complained of come within the four (4) corners of the words used in the statute. [Emphasis added.]

Finally, it is clear that petitioner's claim for compensatory damages is barred by her $100,000 settlement with PDC. Petitioner has not sought certiorari with respect to the Court of Appeals' unequivocal holding that she failed to prove substan-

tial damages and it is clear from the opinon below that, even assuming she were granted a new trial, no award in her favor in excess of the amount of the PDC settlement could be justified and permitted to stand. In these circumstances, New York General Obligations Law, § 15-103, reproduced *infra*, at RA-10, prohibits a "double recovery" by petitioner and expressly provides that the $100,000 paid to petitioner by PDC "shall be credited" against any award in petitioner's favor against respondent.[10] Thus, petitioner's claim for compensatory damages has been more than satisfied and is *moot*.

CONCLUSION

It is undisputed that the First Amendment applies with equal vigor to *national periodical distributors* as well as publishers, for "liberty of circulating is as essential to that freedom as liberty of publishing, indeed without the circulation the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1887); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Yet petitioner would entice this Court into a holding which would propel *national magazine distributors* such as respondent into the role of censoring the contents of the magazines circulated through their distribution chains. Such a holding—the only one which could possibly resuscitate petitioner's claim, which rests exclusively on the alleged failure of respondent to police and censor the contents of *Adelina*—would be directly contrary to the sound and still vital public policy espoused by this Court in *Smith v. California*, 361 U.S. 147, 153 (1959):

> "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." *The King v. Ewart*, 25 N.Z.L.R. 709, 729 (C.A.). And the bookseller's bur-

10 Indeed, any other result under New York law would run afoul of the *Gertz* prohibition against recovery of more than "such damages as are sufficient to compensate . . . for actual injury" absent clear and convincing evidence of constitutional malice. 418 U.S. at 349-350.

> den would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The booksellers limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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March 27, 1985

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* In compliance with Supreme Court Rule 28.1, respondent states that it is a wholly owned subsidiary of L.F.P., Inc. and an affiliate of Hustler Magazine, Inc., Gentleman's Companion, Inc., MCA Advertising, Flynt Subscription Company, Flynt Disc, and Hustler Productions, Inc.

APPENDIX

Partial List of Press Materials and Digest of Articles About Jackie Collins Appearing in Celebrity and Gossip Column Sections of Newspapers and Magazines Throughout the United States

Press release prepared by Grosset & Dunlop entitled "Jackie Collins"; Suggested questions for Jackie Collins (for media interviews); Press release biography of Jackie Collins; Article from *World Times* (1978) entitled "Big Money and Low Life in the Pop World"; Press release from Marilyn Beck's Hollywood/Show Business in the News; Article from *Variety* entitled "Novelist Jackie Collins Aims at 'Total Control' of Her Future Pix; Article from the *Sunday Daily News*, September 30, 1979, entitled "Some Of My Best Friends Are Men"; Article from the *New York Post* entitled "Last Night with Martin Burden"—headline: "Equal Nudes for All", September 1979; Article from *The Hollywood Reporter*, November 1, 1979; Article from the *Detroit Free Press*, September 25, 1979; Article entitled "New York Callings"; Article from *The Record*; Hackensack, New Jersey; Article from the *Standard Star*, New Rochelle, N.Y., September 23, 1979; Liz Smith Comments, from the *New York Daily News*, September 1979; Article from *Penthouse* magazine (1978) entitled "A View From the Top; Jackie Collins, Joan's Kid Sister"; Article entitled "Jackie, the Girl Who Shocked Tom Jones"; Article from *Los Angeles Herald Examiner* entitled "The Cushing Report; A Double Shot of Collins", September 9, 1979; Article from *San Francisco Examiner* entitled "She Writes Sexy Films for Sister", November 29, 1979; Article from the *Detroit Free Press*, November 4, 1979; Film review from *Variety* of "The World is Full of Married Men"; Article from *The Republican*, September 26, 1979; Article from the *New York Post* entitled "Last Night with Martin Burden"—headline "Quotes and Notes", September, 1979; Article from the *New York Daily News* entitled "Jessica Who?", October 14, 1979; Article entitled "Just for Variety" by Army Archerd; Article from the *New York Post* entitled "Jack Martin's Headliners"—Headline "Martin's Sideliners", November 1979; Article from *The Hol-*

lywood Reporter; Excerpts from book reviews of *Lovers and Gamblers*; Book review from *Houston Chronicle*, October 7, 1979; Book review of *Lovers and Gamblers* entitled "Sexperience, Anglo-American Style"; Article from *Women's World* entitled "Why Am I So Shocking"; Interview in *Titbits* entitled "Stripplets Who Shocked A Pop Star," April 19, 1979; Interview in *Frizz* magazine entitled "Jackie Collins; Article entitled "What Jackie Collins Tells Her Daughters"; Article from *People* magazine entitled "Jackie Says She's A Moralist, But Why Do Her Novels have Titles Like *The Stud*?", August, 1979; Article from the *Chicago Sunday Sun Times* entitled "Jackie Collins Studs Her Stories With Sex" November 25, 1979; Interview in Penthouse *Forum* magazine; Interview in *Ritz* magazine, October 1979; Article from the *Chicago Tribune*, entitled "This Collins' Career is Going Fully Steamy", September 23, 1979; Interview of Jackie Collins by Fred Robbins; Collin's publicity schedule for Cleveland and Chicago, September 11, 1979; Publicity schedule for Chicago, September 14, 1979; Memorandum from Solsters & Roskin; Publicity list for 1979 tour.

Text of Article Complained of, Published in "Archives" Section of May, 1980 Issue of Adelina Magazine, at Page 117

A woman's ability to communicate sexuality on film is a unique talent, one which many beautiful actresses do not possess. Beauty alone is not enough; the sensuality must come from within, controlling subtle actions—nuances of body movements, facial expressions, even voice inflections.

Throughout the history of film, the most successful actresses have had the quality of "reaching out" to the male, of giving his fantasies a form and substance they could never have attained without the near-reality created by film images.

As recently as the late 1960's, nudity and the honest depiction of sex were all but unknown. A nude man and woman, in bed, kissing, touching, engaging in foreplay or simulating the motions of sexual intercourse? Forbidden in all but the mildest forms, for a few seconds, then fadeout. Only in foreign films were more explicit sexual activities shown, and they were heavily censored before release in America. Or two versions of such scenes were filmed, one for European audiences, another for American.

Eventually, inevitably, following favorable court decisions in cases involving films considered to be pornographic but having what was called "socially redeeming value," America's legitimate filmmakers became more daring in their portrayal of sex and nudity.

A ratings system was devised to protect the young and squeamish from films whose sexual content was deemed explicit, or in which there was nudity. European films were shown uncensored in their original versions.

With this "coming of age" of American filmmaking—and American audiences—actresses were given the opportunity to free their natural ability to express sexuality. And even those actresses whose sexuality had only been hinted at, which was more latent than expressed, was released, often from the most unexpected of them—the world-famous, formerly known only for their purely "dramatic" talents; those whose previous roles had been of "demure" types; older actresses, whose more

mature and self-confident sexuality was at least as exciting as that of younger actresses; and those not known for their beauty but whose inner sensuality overcame the lack of physical attractiveness.

Today, there are few actresses who will reject a role because it requires nudity. On these pages, the pleasing result of this liberated attitude.

June, 1980 Publisher's Subscription Solicitation Page (Page 99 of June, 1980 Issue of *Adelina* Magazine) for which Petitioner was Awarded $1.2 Million in Compensatory and $1 Million in Punitive Damages Against FDC

"I ALREADY MISSED SEVERAL ISSUES OF THE BEAUTIFUL ADELINA!"

You did? Well, that's no problem. We happen to have a few copies of each issue left which we are holding in case some of you want to find out what you missed. Just fill out the order coupon below. And you'd better subscribe, too—so you won't miss any more issues of ADELINA. There, that wasn't hard, was it?

"I DON'T WANT TO MISS ONE ISSUE OF THE BEAUTIFUL ADELINA!"

You don't? Well, that's easy enough to take care of. You've got life insurance, car insurance, fire insurance and maybe even homeowners' insurance—so why not get some ADELINA insurance? Subscribe today and insure that you won't miss the best new men's magazine of the 1980s.

MAIL TO:
ADELINA BACK ISSUES
Suite 1502, 527 Madison Avenue, New York, NY 10022

YES, I WANT THESE BACK ISSUES:
(Send $3.25 per issue—includes postage and handling)

☐ No. 1 (Jan 80) ☐ No. 2 (Feb 80) ☐ No. 3 (Apr 80) ☐ No. 4 (May 80)
☐ No. 5 (Jun 80) ☐ No. 6 (Jul 80) ☐ No. 7 (Aug 80) ☐ No. 8 (Sept 80)
☐ No. 9 (Nov 80) TOTAL $_____

Yes, I want ADELINA insurance. Start my subscription with the next issue.
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_____ 24 issues (regular newsstand price $70.80) PA ONLY $50
GRAND TOTAL $_____

_____Check or money order enclosed _____BankAmericard _____MasterCard
Acct # _____ Expiration date _____
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name _____
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city _____ state _____ zip _____
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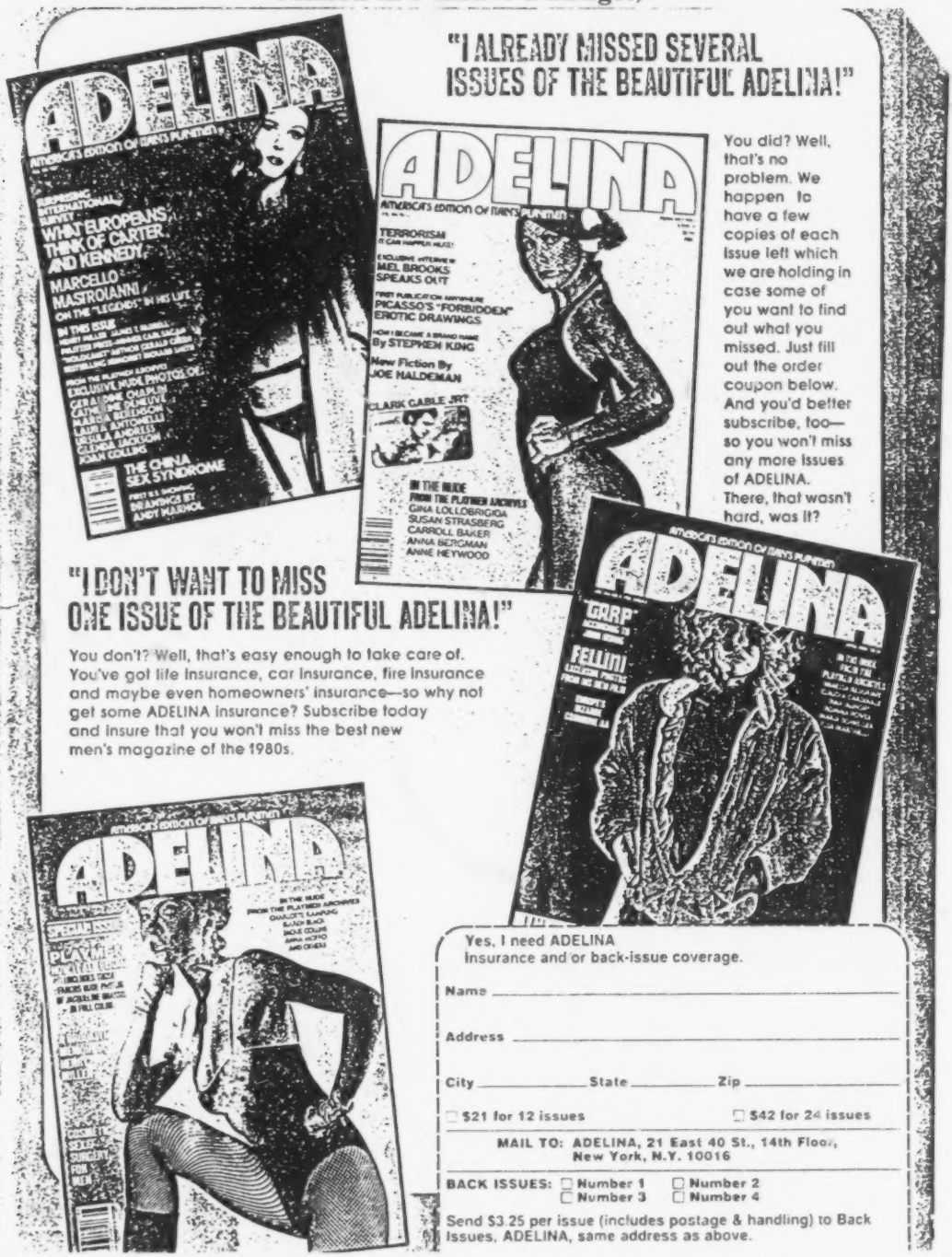
January, 1981 Publisher's Subscription Solicitation Page (Page 98 of January, 1981 Issue of *Adelina* Magazine) for which Petitioner was Awarded $5 Million in Compensatory and $32 Million in Punitive Damages Against FDC (Remitted to $2 Million in Punitive Damages)



Petitioner's "Supplementary Proposed Jury Instruction" with Respect to Malice (Submitted June 16, 1983—The Fourth Day of Trial)

* * * Punitive damages are appropriate if you find that Flynt acted maliciously or recklessly in using her name for advertising purposes. In reaching your determination on whether defendant distributed the materials complained of maliciously or recklessly, you should determine whether these materials were distributed in good faith. A defendant's testimony that he acted in good faith is not conclusive as to that issue. You must decide in light of all the surrounding circumstances whether defendant indeed acted in good faith. The circumstances you may consider in assessing punitive damages include whether or not Flynt was previously put on notice or otherwise warned about using her name and whether or not Flynt disobeyed this Court's order requiring it to retrieve the magazines from the channel of distribution.

Dated: New York, New York
June 15, 1983

Respectfully submitted,

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Excerpt From Transcript of Oral Argument in the United States Court of Appeals (January 30, 1984)

JUDGE CARDAMONE: How do you distinguish this case from the rationale of Time v. Hill?

MR. DAICHMAN: Let me go through an illustration which I think will demonstrate the accommodation of the First Amendment values to Section 51, and let me start with the facts of the Arrington case, which is a Court of Appeals New York case. In that case they took a photograph of a black professional and they used it on the cover of the New York Magazine to illustrate an article on the black middle class. There was no action under Section 51 because his photograph was related to the subject matter of the article. But let me change that fact a little and let us say that the article on the black middle class fictionalized the commentary about Mr. Arrington and said that he had become educated and he turned his back on the ghettos and he left people less fortunate than himself for the affluent suburbs. Now we fictionalize but we still have a connection between Mr. Arrington who is a black middle-class professional and the article on the middle class. That fictionalization would invoke the Time v. Hill rule of constitutional malice.

A third and final example is: You take Mr. Arrington's picture, you put it on the cover of a magazine, and you have a story about dope rings and dope peddling in New York City. If Mr. Arrington has nothing to do with that, that is a commercial use, it is a trade function, under Section 51. That is exactly what the Davis court said, which they cite in their brief. The Davis court said: When the plaintiff's photograph is used as an illustration in an article on illicit drug dealing, with which in fact the plaintiff has no connection, the use may be considered as one for trade, citing a case called Thompson v. Close-Up.

[Transcript, page 26, line 12, through page 27, line 18.]

New York State Constitution, Article 1, § 8

§ 8. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

New York General Obligations Law § 15-103

§ 15-103. Consideration to be credited to co-obligor

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor giving the consideration did not stand in the relation of a surety.